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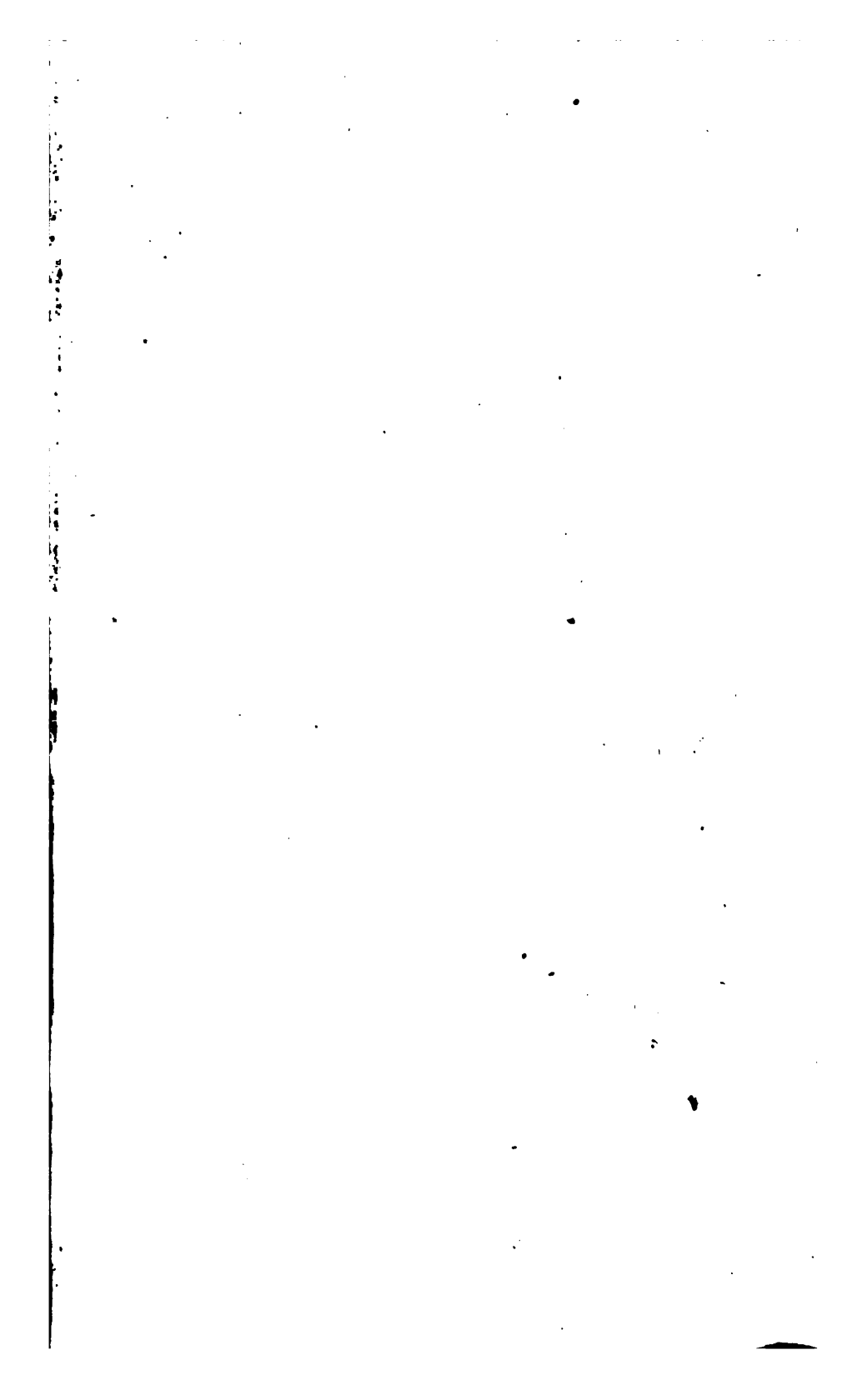
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REPORTS
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Court of Appeals

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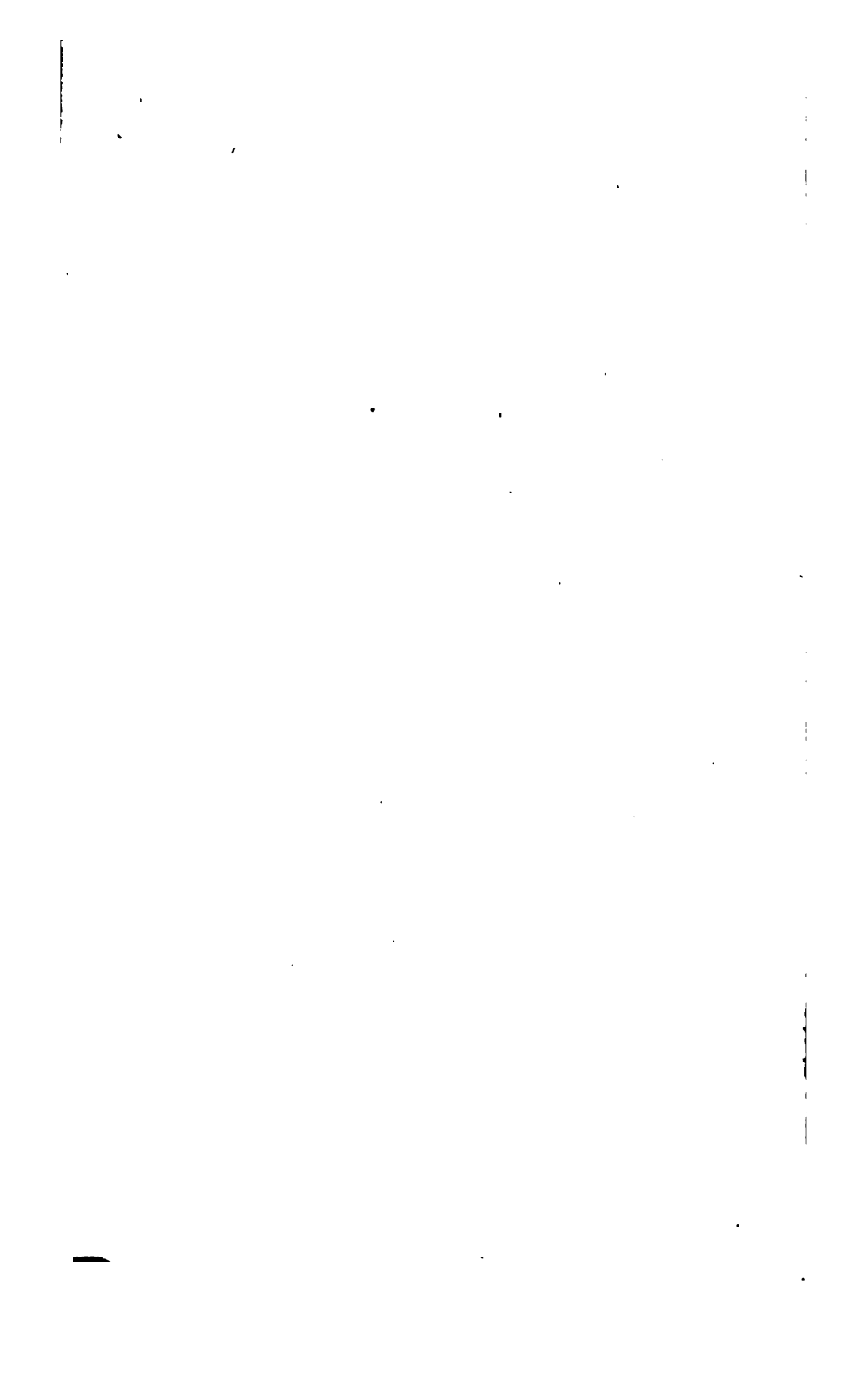
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VOL. III
Containing the *Law* opinions, in 1825 and 1826, from the
commencement of the new Court

Columbia, S. C.
PRINTED BY DOYLE E. SWEENEY
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.....

1826.



NOTICE.

The present volume commences with the New Court of Appeals of South Carolina, and contains all the *law* decisions made by the court since its new organization, except the cases of the last Charleston Term, the manuscripts of which the Reporter could not procure until it was too late to include them in this volume. The volume of Mr *Harper's* Law Reports, brought up the law decisions to the formation of the new Court. The Reporter has thought it most advisable to leave the Equity Cases for a separate volume. In many cases argued at Columbia, May 1826, the opinions of the court have not yet been delivered, which will explain why they are not published. By mistake of the Clerk, the opinions of Judge Johnson, delivered in the Columbia January Term, 1826, were included in the preceeding April Term, in which they have been published.

All the cases published in this volume were argued before the appointment of the present Reporter to that office, except those published in the last Term of this volume. For the notes of arguments published in the two first terms contained in this volume, the Reporter is indebted to his friend, *Wm. Harper* Esq. his late predecessor, who, upon his appointment to the Senate of the United States, was kind enough to give him all his notes, which he had previously taken.

The Reporter begs leave to return his thanks to the Hon. Judge *Johnson*, who unsolicited, was so kind as to take notes of arguments for him, of the Charleston Term which has not yet been published. The uniform urbanity simplicity and unpretending kindness of his Honour has obtained for him the universal respect and love of every member of the profession.

JUDGES

DURING THE PERIOD COMPRISED IN THIS VOLUME.



Of the Court of Appeals.

Hon. ABRAHAM NOTT, *Presiding Judge.*
Hon. C. J. COLCOCK.
Hon. DAVID JOHNSON.

Of the Circuit Courts.

Hon. E. H. BAY.*
Hon. THEODORE GAILLARD.
Hon. RICHARD GANTT.
Hon. D. E. HUGER.
Hon. W. D. JAMES.
Hon. J. S. RICHARDSON.
Hon. THOMAS WATIES.

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P. E. PEARESON, Esq. (*Middle Circuit.*)
F. H. ELMORE, Esq. (*Northeastern Circuit.*)

* *Exempt from Circuit duty on account of age.*



A TABLE

OF THE

NAMES OF THE CASES

Reported in this Volume.

A.		<i>Brown ads. Moore,</i>	9
<i>Aiken ads. Howard,</i>	467	<i>Bunch ads. Rhodes,</i>	66
<i>Anderson ads. Atkinson,</i>	223	<i>Butler and Quin ads. The State,</i>	383
<i>Anderson vs. Maddox,</i>	237	<i>Bynum vs. Clark,</i>	298
<i>Ansley vs. Timmons,</i>	329	C.	
<i>Atkinson vs. Anderson,</i>	223	<i>Cain ads. Rivers,</i>	23
B.		<i>Caldwell ads. Lyles,</i>	225
<i>Bagwell ads. Miller,</i>	429-569	<i>Camberford vs. Hall,</i>	345
<i>Bailey vs. Wright,</i>	484	<i>Canter vs. Sumter,</i>	71
<i>Baker ads. Bank,</i>	281	<i>Canter vs. Ventry and Wardens,</i>	317
<i>Baldrick ads. Ryan,</i>	498	<i>Canter and Johnson ads. Peake,</i>	107
<i>Bank vs. Gibbes,</i>	377	<i>Capers vs. Wilson,</i>	170
<i>Bank vs. Croft,</i>	522	<i>Carson vs. Richardson,</i>	528
<i>Bank vs. Baker,</i>	281	<i>Chanet vs. Villeponteaux,</i>	29
<i>Barkdale vs. Morrison,</i>	184	<i>Chatzel & Co. vs. Bolton,</i>	33
<i>Barkley vs. Barkley,</i>	269	<i>Clarke ads. Blake,</i>	179
<i>Barns vs. Branch,</i>	19	<i>Clarke ads. Bynum,</i>	298
<i>Barnstine vs. Eggart,</i>	162	<i>Clarke ads. Fife & Co.</i>	347
<i>Barino vs. McGee,</i>	452	<i>Clancy and Johnson ads. Davis,</i>	422
<i>Bates vs. Geat,</i>	493	<i>Clifford ads. Pemble,</i>	43
<i>Beckley ads. Wakefield,</i>	480	<i>Coate vs. Speer,</i>	227
<i>Becket ads. The State,</i>	290	<i>Coburn ads. Crovat,</i>	14
<i>Becket and Wilkins ads. Primrose,</i>	418	<i>Cole ads. Harrison,</i>	509
<i>Beers & Bunnell ads. Elms & Co.</i>	1	<i>Colcock vs. Goode and Rose,</i>	513
<i>Bell vs. Strother,</i>	207	<i>Connolly ads. Hull,</i>	6
<i>Bent vs. Graves,</i>	280	<i>Corrie vs. Fitz,</i>	25
<i>Billings vs. Lemon,</i>	51	<i>Covington ads. Townsend,</i>	210
<i>Bird vs. Smith,</i>	300	<i>Craig vs. Reeder,</i>	411
<i>Blake vs. Clarke,</i>	179	<i>Creyton & Sloan vs. Dickerson,</i>	438
<i>vs. Quash,</i>	340	<i>Cripps ads. Talvande,</i>	147
<i>Blakely ads. Hampton,</i>	469	<i>Crovat vs. Coburn,</i>	14
<i>Blythe ads. The State,</i>	383	<i>Croft ads. The Bank,</i>	522
<i>Blythe vs. Sutherland,</i>	258	<i>Cruickshanks vs. Frean,</i>	84
<i>Bolton ads. Chatzel & Co.</i>	33	<i>Cureton vs. Shelton,</i>	412
<i>Bourdeaux ads. Treasurers,</i>	142	<i>Cuthbert vs. Lawton,</i>	194
<i>Bowlware ads. Hogan,</i>	251	D.	
<i>Braker ads. Knight,</i>	80	<i>Davega vs. Moore,</i>	482
<i>Branch ads. Barnes,</i>	261	<i>Davis vs. Clancy and Johnson,</i>	423
<i>Brannon ads. Turpin,</i>	183	<i>Davis ads. Desprang,</i>	16
<i>Brown ads. Schroder,</i>			

NAMES OF CASES.

Davis and Lehre <i>vs.</i> Gourdin,	116	ayne <i>vs.</i> Delieesseline,	374
Deal <i>vs.</i> Hanks,	257	ays <i>ads.</i> Fulmer,	256
DeBow <i>ads.</i> M'Clary & Applegate,	44	aywood <i>vs.</i> Middleton,	121
DeLiesseline <i>ads.</i> Hayne,	374	ill <i>ads.</i> Woodward,	241
Dent <i>ads.</i> Goldthwaite,	296	ill <i>ads.</i> Ohors,	338
Desprang <i>vs.</i> Davis,	16	ill <i>ads.</i> Lawton,	223
Dickerson <i>ads.</i> Creyton and Sloan,	438	Hinchy <i>vs.</i> Foster,	428
E.		Hogan <i>vs.</i> Bowlware,	251
Eggart <i>ads.</i> Barnstine,	162	Holman <i>ads.</i> The State	306
Elms & Co. <i>vs.</i> Beers and Bunnel,	1	Houston <i>vs.</i> Houston,	491
English <i>vs.</i> Nixon,	549	Howard <i>ads.</i> Aiken,	487
Evans <i>ads.</i> Solomon,	274	Hull <i>vs.</i> Connolly,	6
		Hutson and Price <i>ads.</i> Robards,	475
		I.	
Falconer & Co. <i>vs.</i> Steele,	45	Irby <i>ads.</i> Kirkpatrick,	205
Fife & Co. <i>vs.</i> Clarke,	347	J.	
Fishburn <i>ads.</i> Galpin,	22	Jacobs <i>ads.</i> Underwood,	447
Fitz <i>ads.</i> Corrie,	25	Jagers <i>ads.</i> M'Creary,	473
Flemming <i>vs.</i> Lyon,	183	James <i>ads.</i> Hall,	222
Foster <i>ads.</i> Hinchy,	428	Jenkins <i>vs.</i> Mavrant,	560
Foster <i>ads.</i> The State,	442	Johnson <i>vs.</i> King & Jones,	365
Freen <i>ads.</i> Cruickshanks,	84	Johnson <i>vs.</i> Veal,	449
Freshly and Veal <i>ads.</i> Wise,	547	K.	
G.		Kennedy <i>ads.</i> Motte,	13
Galpiu <i>vs.</i> Fishburn,	22	Kershaw <i>vs.</i> Whitaker,	577
Galpin <i>vs.</i> Hard,	394	King & Jones <i>ads.</i> Johnson,	365
Garlington <i>ads.</i> M'Kie,	276	Kincaid <i>vs.</i> Neal,	201
Gourdin <i>ads.</i> Davis and Lehre,	116	Kirkpatrick <i>vs.</i> Irby,	206
Gest <i>ads.</i> Bates,	493	Knight <i>vs.</i> Packard,	71
Gibbes <i>ads.</i> Maverick,	315	Knight <i>vs.</i> Braker,	80
Gibbes <i>ads.</i> The Bank,	877	L.	
Gibson <i>vs.</i> Taylor,	451	Lansdale <i>ads.</i> Pringle,	489
Gill <i>ads.</i> Wallis,	475	Large <i>ads.</i> Strobel,	113
Goldthwaite <i>vs.</i> Dent,	296	Do. <i>ads.</i> Do.	114
Goode and Rose <i>ads.</i> Colcock,	513	Lawrin <i>vs.</i> Hanks,	558
Gordon and Spring <i>vs.</i> Liepman,	49	Lawton <i>vs.</i> Hill,	338
Graham <i>ads.</i> M'Clintock,	243	Lawton <i>ads.</i> Cuthbert,	194
Graham <i>ads.</i> M'Clintock,	553	Lecat <i>vs.</i> Taval,	158
Gray <i>vs.</i> Court of Magistrates,	175	Lee <i>vs.</i> Perry,	552
Graves <i>ads.</i> Bent,	280	Lemon <i>ads.</i> Billings,	51
H.		Lewis & Gibbs <i>ads.</i> Maverick,	211
Hole <i>vs.</i> Schulte,	218	Liepman <i>ads.</i> Gordon & Spring,	49
Hall <i>ads.</i> Cumberford,	345	linch <i>ads.</i> Pohl & Son,	385
Hall <i>vs.</i> James,	222	Little <i>ads.</i> Wooden,	487
Hall <i>vs.</i> Moreman,	477	Lowden <i>ads.</i> Moses,	93
Hamilton <i>vs.</i> Reedy,	36	Lowrie <i>vs.</i> Williamson,	247
Hamilton <i>ads.</i> Trimmer,	425	Lowrie <i>vs.</i> Mayson,	313
Hampton <i>vs.</i> Blakely,	468	Lyles <i>vs.</i> Caldwell,	225
Hanks <i>vs.</i> Deal,	257	Lon <i>vs.</i> Fleming,	183
Hanks <i>ads.</i> Lawrin,	558	M.	
Hard <i>vs.</i> Galpin,	39	M'Clary & Applegate <i>vs.</i> DeBow,	44
Harrell <i>vs.</i> Witherspoon	480	M'Clintock <i>vs.</i> Graham,	553
Harrison <i>vs.</i> Cole,	50	M'Clintock <i>vs.</i> Graham	243
Hassan <i>ads.</i> Veal,	278		

NAMES OF CASES.

M'Collough vs. Speed,	455	R.	
M'Croskey <i>ads.</i> The State,	308	Rains <i>ads.</i> The State,	533
M'Creary vs. Jagers,	473	Rearrs <i>ads.</i> Williams,	234
M'Kie vs. Garlington,	276	Reeder <i>ads.</i> Craig,	411
M'Masters <i>ads.</i> Smith,	268	Reedy <i>ads.</i> Hamilton,	38
M'Gee <i>ads.</i> Barino.,	452	Rhodes vs. Bunch,	66
Maddox <i>ads.</i> Anderson,	237	Richardson <i>ads.</i> Carson,	528
Magistrates & Freeholders <i>ads.</i>		Rivers vs. Cain,	299
Gray,	175	Rivers <i>ads.</i> Turnbull,	181
Mairs vs. Smith,	54	Robards vs. Hutson & Price,	475
Margart vs. Swift,	378	Ryan vs. Baldrick,	498
Martin vs. Thompson,	167		
Martin vs. Quattlebam,	205	S.	
Maverick vs. Lewis & Gibbs.	211	Seabrook <i>ads.</i> Williams,	371
Maverick vs. Gibbs,	315	Shepherd vs. Turner,	249
Mayrant <i>ads.</i> Jenkins,	560	Shelton <i>ads.</i> Cureton,	412
Mayson <i>ads.</i> Lowe,	213	Shroder vs. Brown,	183
Meadows vs. Meadows,	458	Schults <i>ads.</i> Hale,	218
Means vs. Moore,	282	Smith <i>ads.</i> Mairs,	54
Middleton <i>ads.</i> Hayward,	121	Smith vs. M'Masters,	288
Miller & Co. vs. Yeadon,	11	Smith <i>ads.</i> Bird,	300
Miller vs. Bagwell	429—562	Smith <i>ads.</i> Wings,	400
Mitchell <i>ads.</i> Degraffinried,	506	Solomon vs. Evans,	274
Moore vs. Brown,	9	Speed vs. M'Collough,	455
Moore <i>ads.</i> Means,	282	Speer <i>ads.</i> Coate,	227
Moore <i>ads.</i> Davoge,	482	State vs. Wilson and Davis,	187
Moreman <i>ads.</i> Hall,	477	State vs. Wimberly,	190
Morrison <i>ads.</i> Barkdale,	184	State vs. Becket,	290
Moses vs. Lowden,	93	State vs. Holman,	306
Motte vs. Kennedy,	13	State vs. M'Croskey,	308
Mullen vs. Wilson,	236	State vs. Blythe,	383
		State vs. Butler and Quin,	383
		State vs. Foster,	442
N.		State vs. Rains,	533
Neal <i>ads.</i> Kincaid,	201	Steele <i>ads.</i> Falconer & Co.	45
Nicks <i>ads.</i> Treadway,	195	Stinson <i>ads.</i> Piper,	261
Nixon <i>ads.</i> English,	549	Stockdale <i>ads.</i> Taylor and Young,	402
		Stoney vs. Union Ins. Company,	387
O		Strobel vs. Large,	113
Ohors vs. Hill,	338	Do. vs. Do.	114
		Strother <i>ads.</i> Bell,	207
P.		Sumter <i>ads.</i> Cantev,	71
Packard <i>ads.</i> Knight,	71	Sutherland <i>ads.</i> Blythe,	258
Parkham <i>ads.</i> Walker & Bragg,	295	Swift vs. Margart,	378
Peake vs. Cantev & Johnson,	107		
Peay vs. Picket,	318		
Pemble vs. Clifford,	43	T.	
Perry vs. Clymote,	245	Talvande vs. Cripps,	147
Perry <i>ads.</i> Lee,	562	Tart <i>ads.</i> Wilkins,	518
Picket <i>ads.</i> Peay,	318	Taval <i>ads.</i> Lecat,	152
Piper vs. Stinson,	251	Taylor and Young vs. Stockdale,	322
Pohl & Son vs. Lynah,	365	Taylor <i>ads.</i> Gibson,	451
Pringle vs. Lansdale	489	Tengue vs. Wilks,	461
Primrose vs. Becket & Wilkins,	418	Thomas vs. Wilson,	166
		Thompson <i>ads.</i> Martin,	167
Q.		Thomas <i>ads.</i> Aubrey,	329
Quashs Ex'rs. <i>ads.</i> Blakes Ex'rs.	340	Treadway vs. Nicks,	194
Quattlebam <i>ads.</i> Martin	206	Treasurers vs. Rep. of Bourdeaux,	142

NAMES OF CASES.

Trimmier <i>vs.</i> Hamilton,	425	Wilks <i>ads.</i> Teague,	518
Townsend <i>vs.</i> Covington,	219	Wilkins <i>vs.</i> Tait,	461
Turnbull <i>vs.</i> Rivers,	131	Williams <i>vs.</i> Rearrs, <i>et. al.</i>	224
Turner <i>ads.</i> Shepherd,	249	Williams <i>vs.</i> Seabrook,	371
Turpin <i>vs.</i> Brannon,	261	Williamson <i>ads.</i> Lowrie,	247
		Wilson <i>ads.</i> Thomas,	166
U.		Wilson <i>ads.</i> Capers,	170
Underwood <i>vs.</i> Jacobs,	447	Wilson & Davis <i>ads.</i> The State,	167
Union Ins. Company <i>vs.</i> Stoney,	387	Wilson <i>vs.</i> Mullen,	236
		Wimberly <i>ads.</i> The State,	190
V.		Wingis <i>vs.</i> Smith,	400
Veal <i>vs.</i> Hassan,	278	Wise <i>vs.</i> Freshly & Veal,	547
Veal <i>ads.</i> Johnson,	449	Witherspoon <i>ads.</i> Harrell,	486
Vestry and Wardens <i>vs.</i> Cantey,	317	Wood <i>vs.</i> Gee,	421
Villeponteaux <i>ads.</i> Chanet,	29	Wooden <i>vs.</i> Little,	497
		Woodward <i>vs.</i> Hill,	241
		Wright <i>ads.</i> Bailey,	448
W.			
Wallis <i>vs.</i> Gill,	476		
Wakefield <i>vs.</i> Beckley,	480	Y.	
Walker & Bragg <i>vs.</i> Parkham,	296	Yeadon <i>ads.</i> Miller & Co ^l	11
Whittaker <i>ads.</i> Kershaw.	677		

Reports of Cases
ARGUED AND DETERMINED
IN THE
COURT OF APPEALS
OF
SOUTH CAROLINA.

BY D. J. McCORD,
STATE REPORTER.

VOL. III.
Containing the *Law* opinions, in 1825 and 1826, from the
commencement of the new Court of Appeals.



COURT OF APPEALS,
OF THE
STATE OF SOUTH CAROLINA,
February Term, 1825—Charleston.

JUDGES PRESENT,

Nott, Colcock, Johnson.

ELMS & Co. vs. BEERS & BUNNELL.

Payment made after suit brought can not be given in evidence under the general issue; but all matters of defence arising after action brought must be pleaded *pursuante* *continuation*.

Less than twenty pounds old currency will not carry costs, except in particular actions enumerated in the act of 1799. (see these exceptions. note (a.)

Tried at Charleston, in May term, 1824, before Mr. Justice Huger.

This was an action brought by Beers & Bunnell the payees against C. Elms & Co. the drawers of a certain bill of exchange for \$600 upon Wm. P. Bason and protested for non-payment. It appeared from the statement of facts made by Mr. Eggleston, the plaintiff's attorney, which statement was agreed upon on both sides and embraced all the facts in the case; that separate actions were commenced against Wm. P. Bason as the acceptor, and C. Elms & Co. as the drawers

(a.) The exceptions alluded to are "all actions of trespass to try titles to lands; in all actions of trespass on the case, in all actions of trover, and in all actions of detinue, or any of them brought to establish or try the right of title in any kind of property, if the plaintiff establishes his right of property therein, he shall in every such case recover and have his full cost of suit, wherein the verdict shall be above four dollars." 1 Brev. Dig. 194. 2 Faust 320.
R.

of the said bill of exchange at the same time. That the action against Wm. P. Bason was commenced in the city court, and the one against C. Elms & Co. in the court of common pleas; that in October term 1823, judgment was obtained against Bason for the amount of the bill with interest and costs, that on the 5th day of December 1823, the said Wm. P. Bason paid up the full amount of the judgment against him and took from Messrs. Eggleston and Heriot, the plaintiff's attornies, a receipt of which the following is a copy:

"In the city court, judgment, Oct. Term, 1823.

<i>Beers & Bunnell,</i>	} Bill	\$600	
vs.			
<i>Wm. P. Bason.</i>	} Interest from 7th May 1823, till 7th Dec. 1823.	} 25 08	
	Protest,	\$ 2 00	
	Costs,	33 00	35
			<hr/> \$660 08

Received, Charleston 5th December 1823, by the hands of Mr. Robert Knight for the above named defendant Wm. P. Bason, the sum of six hundred and sixty dollars eight cents, in full of the above mentioned suit.

[Signed,]

Eggleston & Heriot.

That on the 7th day of January 1824, the plaintiff's attornies filed their declaration in this case in the usual form upon the said bill of exchange, and on the same day the defendants by their attorney put in their plea of non-assumpsit; whereupon issue was joined and the cause docketed for trial. Upon these facts it was submitted to the court whether or not the plaintiffs were entitled to costs. It was contended on the part of the defendants, that the plaintiffs were not entitled to a verdict for any part of the principal of the said debt or to costs in that action, and that on the contrary the defendants were entitled to a verdict. The presiding judge decided that the plaintiffs were entitled to recover costs; and for that purpose directed the jury to find a verdict for the plain-

iffs for one cent damages which was accordingly done. A motion for a new trial was made on the grounds:

1st. That the presiding judge was mistaken, in point of law, in deciding that under the circumstances of the case, the plaintiffs were entitled to recover costs:

2d. That under the plea of non-assumpsit, it was competent for the defendants to avail themselves of a payment made at any time before issue joined, or before trial:

3d. That no plea of payment made after suit brought, either *pais darrien continuance*, or against the further maintenance of the action was necessary in this case, as the fact of payment was not offered to be proved by the defendants, but was admitted by the plaintiffs and stated by them as a part of their case; and that the presiding judge misdirected the jury in charging them to find for the plaintiffs.

Argued 3d March, 1825.

Rice for the motion.—Argued that the defendant could as well avail himself under the general issue of payment made after action brought, as payment before action. The fact was stated by plaintiff himself, not proved by defendant. Costs must depend on the judgment, and be determined by it. (*Tidd*. 864, 13 *John. Rep.* 345. 2 *John. Cases* 206;) and until judgment no right to costs accrues. If so, and the plaintiff discharges the cause of action, of course nothing remains upon which he can recover costs.

It is on these principles that when suit is settled and nothing said about costs, that neither party are entitled to recover them of the other, (*Watsons vs. Depeyster*, 1 *Caines' Rep.* 66. *Johnston vs. Brannan*, 5 *Johns. Rep.* 268.) Plaintiff goes on the original cause of action. The case of *Johnson vs. Brennan* precisely similar to this. (2 *Mass. Rep.* 171.)

It is competent to prove payment made any time previous to the trial of the issue. May shew payment or release, under the general issue. No difference in nature of things between payment made before and after action

brought. Under general issue payment after action brought may be given in evidence. (7 *Mass. Rep.* 325, 3 *Burrows*, 1345.) In *Burrows* the payment was made by another party who was made liable. Can't plead by special plea in bar, matter arising after commencement of suit, (4 *East* 502.)

Grimke contra.—Mistake that plaintiff's statement made a difference. Did not follow that it was not still the evidence of defendant. When you plead in bar generally, you must shew no cause of action at the time of action brought. *Non assumpsit* refers to time of bringing suit. Well settled rules must be adhered to. If defence arises after plea, it must be pleaded *puis darrien continuance*. It is necessary to prevent surprise, as one might be by an act done by a third person. (Cited 1 *Chitty Plead.* 634.) Plea of matter since suit should be in bar of further maintenance, (20 *John Rep.* 414,) and can't be pleaded in bar generally.

Under *non-assumpsit*, the question is whether there existed the cause of action at commencement of suit. (*Tidd* 591. *Doug.* 106. 7. *Gill. C. P.* 645.) Award *pendente lite* not admitted under *non-assumpsit*. (1 *Munf.* 22. *Peake Evid.* 248.)

As to the costs, it was a matter for the jury; their finding fixed it. (2 *Brev. Dig.* 58. *Tid. costs.*) As to amending the verdict, cited 2 *Dall.* 115.

The case of *Johnston* and *Brannon* depends on makers liability for indorsers costs. In this state he is not. Cited as to costs, 7 *East* 538. *Chitty on Bills* 444. 1 *John Rep.* 290. 3 *Johns. Rep.* 356. 2 *McCord's Rep.* 461.

The case in 3 *Burr.* not in point. The satisfaction was before action brought.

Rice in reply.—Rule has always been in New-York, that maker is not liable for indorsers costs.

Colcock J.—Whatever may have been the intention of the jury in this case, it is clear that the plaintiff is not entitled to costs on their finding. Less than twenty pounds old

currency will not carry costs (by act of 1747,) except in particular actions enumerated in the act of 1799. The amount in dispute is, however, too small to warrant the court in interfering with the verdict, *de minimis non curat lex*. But there are some questions which have been raised in this case on which the court think proper to express an opinion. It has been contended that payment may be given in evidence under the general issue, even where it has been made after the commencement of the suit; and the court have been referred to the case of *Brennan vs. Egan*. (4 *Taunton* 165,) and *Bird vs. Randall* (3, *Burrows*, 1345.) But on examination neither of these cases support the position. It is well established that payment may be given in evidence under the general issue where it is made before action brought; because it goes then to shew that the plaintiff had no cause of action when the suit was commenced. But even this as Lord Holt observes, is a practice which has crept in improperly, though now too long settled to be altered, (1. *Chitty* 472 3) Where the matter of defence arose before the commencement of the suit, *actio non*, &c. is generally the proper commencement of the plea. But no matter of defence arising after action brought can properly be pleaded generally, but ought to be pleaded in bar of the further maintenance of the suit; and if matter of defence arise after issue joined it must be pleaded *puin darrien continuance*, (1 *Chitty* 389.) Thus the defendant in such cases, can always obtain the leave of the court to put in such plea as will meet the justice of the case on payment of the costs due; or he may on motion obtain an order to stay proceedings on the payment of costs, unless the plaintiff deny the fact, in which case the court will give him leave to plead, and they may proceed to trial.

Rice, for the motion.

Grimke, contra.

MARY & MARTHA CONNOLLY, ads. Assignees of HULL

A contract for the purchase of goods by two, may be for their *equal*, and not for their joint benefit.

If a contract be made by an infant and an adult, they can not both be sued thereon, but the action should be brought against the adult only.

An infant who lives with and is properly maintained by her parents can not bind herself to a stranger for necessities; and where daughters live with their mother, it should be presumed that they were properly maintained by their parent until the contrary be proved; for the mother being the best judge of what is necessary for them, should be consulted before credit be given them.

Tried at Charleston, before the late recorder Judge Drayton, of the city court, in January Term, 1825, who sent up the following report:

"The sale and delivery to both of the defendants upon their joint contracts were fully proved. Mr. O'Hara proved that one of the defendants was an infant about 19 years old; that the defendants were young ladies living in Charleston, but he knew nothing of their pecuniary means. The counsel for the defendants contended that as the suit brought was upon a joint contract, one of them being an infant, upon whom no contract was obligatory, the plaintiffs could not maintain their action. He cited *1st. Chitty's Plead.* 30 and 32. The counsel also insisted that the articles furnished were not necessities. The plaintiffs counsel replied that the account was for necessities fitted to the situation of the infant as would appear by an inspection of the items. The general rule in pleading, appeared to me to be correctly cited, that when a joint action is brought against two and one of them did not enter into the contract, or was legally incompetent to have done so, in either event, the plaintiff could not recover against both. But the facts in this case do not support the position relied upon. If the articles sold to the infant were necessities, the infant was liable. An infant can enter into a contract for necessities, which is neither void nor voidable. (*1st. Com. on Contr.* 154.) If an infant contracts for his necessary diet, apparel, &c. it shall bind him. (*Ibid.* 155. *Coke on Litt.* 172.) Such necessities must appear to

be suitable to the infants estate and condition, of which the court and jury will determine. (*Id.* 155.) It having been proved that the sale was made at the request of the infant, and the court being satisfied that the articles for which its decree was prayed for, were necessarily fitting her situation in life, she was legally responsible to pay for them. Being legally responsible, her case does not come within the principle relied upon by her counsel. If the plea of infancy had been generally sustained, or if it had been replied that the contract was for necessities, and that replication had been overruled, then the defendant must have prevailed; but as neither of these decisions were made, the objection is not supported. It therefore, decreed for the plaintiffs, deducting such items as did not seem to me to come within the description of articles necessary for one in the situation of the infant defendant."

A motion for a new trial was now made on the grounds:

1st. That the action was brought on a joint contract, and it was established in evidence that one of the defendants was a minor, and no evidence was offered by the plaintiff to shew that the goods for which the action was brought were necessities.

2nd. That the decree is otherwise contrary to law and the weight of evidence.

Argued 10th March, 1825.

Bailey for the motion.—Cited 3 *Esp. Rep.* 76. 5 *Do.* 480, and contended that in a joint action, if one is an infant, the plaintiff cannot enter a *vol. pros.* as to one, and go against the other. (5 *Johns. Rep.* 160.) There should have been some other evidence, than the inspection of the judge, that the articles were not necessary (3 *Bac. Ab.* 593.) Averment of plaintiff that the things are necessary, must be proved. (1 *Com. on Con.* 156. 1 *M. Cord* 573.) A negative cannot be proved. (*Buller* 298.) Must appear to be clearly necessary (2 *Nott and M. Cord* 525. *Grant on New Trials*, 178.)

Besides, defendants lived with their mother, and an infant living with her parent who provides, is not liable for

necessaries. (1 *Com. on Cont.* 156.) Infant cannot bind herself for the benefit of others. Joint contract presumed for the benefit of both; both bound for the whole. Here is \$56 contracted in one day. Bound to enquire. (1 *Com. Con.* 157.)

Dunkin, contra; said the mother was proved to be indigent.

NORR, J.—The court concur with the Recorder in the general view which he has taken of this case. But a question has arisen in the course of the argument which was not made in the court below, on which it has become necessary to express an opinion and which will lead to a different result. This appears to be a joint contract for the equal benefit of both the defendants. But it can not be for their joint benefit, because the articles are of such a nature as to enure to the separate use of each. The effect of the decree will be to make each liable for the whole. The articles intended for the elder sister, could not be necessary for the younger, who was under age. As it regards her, therefore, the contract was voidable under the plea. Indeed it is laid down that if a contract is made by an infant and an adult, they cannot both be sued thereon, but the action should be brought against the adult only, as being the sole contracting party in point of law. (1st *Com. on Con.* 152, 166. 3 *Espinasse Rep.* 76. 4 *Taunton* 468. 5 *Espinasse* 47. 5 *Johnson Rep.* 160. 1 *Wills* 90. 1 *Saund.* 207.)

There is another difficulty in this case which in all probability, it will not be easy to surmount. The defendants were living with their mother at the time this contract was entered into. And it appears to be a pretty well settled principle, that an infant who lives with, and, is properly maintained by her parents, cannot bind herself to a stranger for necessaries. (1 *Com. on Con.* 144, 156, 7. 2 *Blacks. Rep.* 1325. 1 *Espin. Rep.* 211.) Whether the mother in this instance was able and did maintain her daughters in a manner suitable to their condition, did not appear; but it ought to be presumed until the contrary be proved, for

although the mother is not considered as the natural guardian of her children to the same extent as the father, yet she has an interest in their welfare which renders her the fittest judge of those things, and particularly in the articles of clothing, which are necessary for their convenience and comfort. It would have a most unfortunate tendency to permit daughters during their minority, to indulge those extravagant notions, which too many at that age entertain, of what is necessary for them, unaided by the salutary advice and control of their mothers. The plaintiff might have inquired into their circumstances and consulted the mother before he suffered the debt to be contracted. Evidence may, perhaps, be offered on another trial to make the case an exception to the general rule; but a new trial must now be granted.

Bailey, Ford and DeSaussure, for the motion,
Dunkin, contra.

JOHN D. BROWN, *ads.* STEPHEN WEST MOORE, *for* MARIA
 TATE.

A note given in New-Orleans by the debtor then living there, to a transient person who indorses it to the plaintiff living in Charleston, may be sued upon before the city court, where the defendant the drawer has removed to Charleston, and is living there at the time suit is brought.

Assumpsit on a promissory note.

Tried at Charleston, before Judge Drayton, the recorder, who made the following report:

"The following statement of facts was submitted by the parties. The note was drawn in New-Orleans by the defendant in favor of one Hatcher, dated 1st May, 1821, payable 30 days after date. Hatcher indorsed it to the plaintiff; Hatcher is a transient person; the plaintiff is a resident of the city of Charleston. On the 5th April 1823, the defendant paid in Charleston \$80 in part of the note. The defendant left

New Orleans on the 10th June 1821, and has resided in Charleston since the 14th July in the same year. No demand for payment of the note had been made upon the defendant in New Orleans. The action in the city court was commenced against the defendant on the 18th June, 1824. Several grounds of defence were taken at the trial, but as the appeal is exclusively founded upon the want of jurisdiction in the court, it will not be necessary for me to notice any other. The defendant's counsel contended that as the cause of action had arisen at New-Orleans, this court had no jurisdiction under the acts of Assembly passed in 1801 and 1818. As there appeared to me to be no doubt of the courts having jurisdiction, I overruled the plea in bar to its jurisdiction, upon which the case went to the jury, who found a verdict for the plaintiff." A motion was made to set aside the verdict on the ground:

That the note having been dated and drawn at New-Orleans, the cause of action was not within the jurisdiction of the city court of Charleston, under the acts of 1801 and 1818.

Argued, 8th March 1835.

Eckhard, for the motion.—By the act of 1801, (3 *Brev. Dig.* 47, 8,) jurisdiction is given to the court over such contracts or causes of action as are made or arise within the city. The expression of the act of 1812, is arising within the city. The act of 1801 provides nothing shall prevent a suit against one resident within the city.

The act of 1818 only enlarges the jurisdiction as to the amount to be sued for. Jurisdiction not to be extended by construction. (*Talman vs. Thomson*, 2 *M. Cord* 45.)

Finley contra.—The act of 1801, contains nothing in it a bar to an action between a resident of another state, and a citizen of Charleston. (1 *M. Cord* 325.)

Frost in reply.—The preamble is a key to the statute. Local jurisdiction for contracts arising in Charleston, to be judged of by the customs of the city. For trial of causes arising in the city.

Per Curiam —The court is satisfied with the opinion of the recorder. The motion is refused.

WM. S. MILLER & Co. vs. WM. YEADON City Sheriff.

The city coroner and not the district coroner, is the proper officer to serve a writ upon the city sheriff of Charleston.

Motion to set aside a writ served upon the city sheriff by the district coroner.

Tried before the recorder who made the following report:

The defendants counsel moved to set aside the writ in this case, because it had been served by the coroner of Charleston district upon the defendant, who, at the time of the service, was the city sheriff, alleging that such service was irregular; and that it ought to have been made by the city marshal. The plaintiffs counsel contended that the service was regular, that not only the coroner, but any one excepting the plaintiff, might legally serve a writ upon the sheriff or any other defendant, (2 *Sellon's Practice* 89. *Barnes* 404.) He also relied upon the A. A. of 1706 (*Pub. Laws*, 11) In the year 1801, the city court was established by an act of the legislature. In the year 1783, the city of Charleston was incorporated, and under this act, the corporation were authorized to elect a recorder, treasurer, &c. &c. and "all such other officers as should appear to them requisite, and necessary for carrying into effectual execution, all the by-laws, rules and ordinances, that they may make for the good order and government of the said city, and the persons residing within the same." Under the authority of this act, the corporation in 1790, elected a city marshal. It is evident that the officers to be elected under the act of 1783, are exclusively such as may be necessary to carry into execution, the by-laws, rules and ordinances of the corporation. But the city court was not created by an ordinance of the city, but an act of the legislature; the officers, therefore, contem-

plated by the act of 1783, could not relate to the officers of a court, or in any manner relate to a court, not then in existence, and which was afterwards established by a legislative act. And although after the existence of the city court, viz: in 1815, an ordinance was passed empowering the city marshal to serve writs upon the city sheriff, yet as the corporation were not authorized by the act of 1783, or by any subsequent act to empower the city marshal to execute any other duties than such as related to by-laws, or ordinances, it did not seem to me that they could confer a legal authority upon that officer to execute processes issuing from a court, created directly by the legislature, and limited in its jurisdiction to matters which depended upon or grew out of the by laws or ordinances of the city. But in 1817, the legislature enacted that the city council should be empowered annually to elect a coroner for the parishes of St. Philip and St. Michael, "who should exercise the same power and authority as were vested in coroners by the laws of this state." Now the act of 1706, having authorised the coroners to execute writs and processes against the sheriff, it followed upon a fair construction of the act of 1817, passed long after the establishment of the city court, that a similar power was given and intended to be given by that act to the city coroner, to serve processes upon the city sheriff. Although this was my impression and so declared to be, when the rule was argued before me, I yet expressed no opinion upon the subject, but decided, that as the service of a writ by the district coroner, upon the city sheriff, was unauthorized by any law, it was a void service, and, therefore, that the writ must be set aside. Notice was served upon me that my decision would be appealed from upon the grounds taken before me."

Argued, 3d March, 1825.

NOTT, J.—The motion is refused. The court concur with the recorder, and think the process might have been served by the city coroner.

Rice for the motion.

Axon contra.

JAMES KENNEDY, *ads.* ABRAHAM MOTTE.

A receipt of a part of an order from the acceptor, after protest of acceptor and drawer both, for non-payment, though without the knowledge or consent of the drawer, is not a discharge of the drawer for the balance unpaid.

Process upon an order by the drawee against the drawer, before the recorder of Charleston, who made the following report:

"This order was dated 3rd October, 1820, payable ninety days after date, and was drawn by the defendant upon the Rev. A. A. Muller, by whom it was accepted on the 16th November, 1820. After a regular demand, upon and a refusal by, the drawer and acceptor, the order was protested for non-payment. Some time after the protest, the acceptor paid \$30 on account. No steps of any kind were taken afterwards by the plaintiff to obtain payment from the acceptor. These facts were admitted, and under them the defendants counsel contended, that a receipt of part of the amount of the order from the acceptor without the knowledge or consent of the drawer, and without any steps having been taken to recover the balance from him, precluded the plaintiff from having any recurrence to the drawer. I decreed for the plaintiff. For after a regular protest for non-payment, he was not bound to apply to the acceptor, but might, exclusively look to the drawer for payment. And the fact of \$30 having been paid on account by the acceptor was a benefit not an injury to the drawer."

A new trial was moved for on the ground:

That a receipt of a part of the order from the acceptor without the knowledge or consent of this defendant, was a discharge to him for the payment of the balance.

Submitted 2d March, 1825.

Per Curiam.—This court concur in opinion with the recorder. The motion is refused.

P. CROVAT and wife, vs. A. COBURN.

A defendant who has given his bond for the prison bounds may be allowed to file his schedule, *nunc pro tunc*, after the forty days, where it had not been done during the forty days, on account of the sickness of his attorney and no neglect on the defendants part, the schedule having been left with attorney before expiration of forty-days. (a.)

Tried at Charleston before Mr. Justice Waties who made the following report:

"THIS case came before the circuit court at the January Term on the following facts:

Defendant was taken on a *ca. sa.* issuing from the court of common pleas in Colleton district, by the sheriff of Charleston district, and admitted to the prison bounds on giving the usual bond, dated 15th June 1824, and conditioned *inter alia* to render a schedule in forty days to the clerk of the court in Charleston. This she did not do. Application was then made to Judge Bay at Charleston, to give her leave to file her schedule *nunc pro tunc*, upon the ground stated in the affidavit of the attorney's clerk, that the schedule had been prepared in time, but had been mislaid during his absence from the office on account of indisposition. Judge Bay having granted the application, an appeal was made to me sitting in term, time to reverse his order. I refused the motion upon the ground, that I was satisfied with the opinion of Judge Bay."

From this decision an appeal was brought up, on the grounds that the judge had no power to make the order for leave to file the schedule *nunc pro tunc*. The case was submitted without argument

COLCOCK, J. delivered the opinion of the court.

By the third section of the prison bounds act, (*Grimke P. L.* 456. 2 *Brevard's Digest* 158,) it is enacted that "all prisoners in execution on any civil process, who are or shall be committed to the custody of any or either of the sheriffs of

(a.) This was in Charleston where the clerks office is not within the prison bounds—*quare*, if that would make any difference. R.

the districts of this state, shall be entitled to the benefit of the said rules, bounds or limits, provided he or she shall within forty days after being taken in execution, give satisfactory security to the sheriff of the district or county where he or she may be confined, (for the solvency of which security, the sheriff shall also be answerable) that he or she will not only remain within the said rules, bounds or limits, but will also within forty days render to the clerk of the court in the district, a schedule on oath or affirmation, (agreeably to the form of his or her religious persuasion,) of his or her whole estate, or so much thereof as will pay and satisfy the sum due on the execution, by force of which he or she shall be confined." And by the seventh section, it is enacted that if such debtor fail to make the schedule within the forty days, he or she shall not be any longer entitled to the bounds, but the bond shall be forfeited and assigned.

It will be observed that the debtor is required not only to remain within the bounds, but that while so remaining, she is also required to render to the clerk of the court the schedule of her property. Now it is impossible that this can be done in person; for if she remain within the bounds, she cannot have access to the clerk whose office is without the bounds. The obvious meaning of the law then is, that the prisoner shall render this schedule by the agency of another. Now although it is a general rule that the principal is liable for the acts of his agent, yet when we examine the reasons of that rule, it will be found not to apply to a case of this kind. A principal is liable for the acts of his agent, first, because he may act for himself; and it is the result of convenience or interest which induces him to employ another; and further when an injury is done, he who causes it must bear the consequences of it. But here the party was trammelled by the law, she was not free to act for herself, nor is there in reality any injury resulting to the party plaintiff from not filing this schedule within the forty days. I say there is no injury, because none has been shewn and none can

be conceived of. The attorney was intrusted with it in due time, who was most certainly as fit an agent as could be employed; and he by sickness, an unavoidable occurrence, was prevented from depositing it with the clerk within the forty days. The case I think, comes clearly within that class of cases in which the courts are in the daily habit of affording relief to parties who might otherwise be injured by the neglect of their attorneys. One employs an attorney to enter an appearance, he from sickness is prevented from attending the court, and judgment by default goes against his client, the court uniformly opens the judgment and suffers the party to plead, upon his shewing that he has a just defence. Nor can I apprehend any danger, as has been suggested, from establishing any thing like precedent in this case; for the court must in every case be well satisfied that the delay was occasioned by some inevitable occurrence; and in enforcing a remedial statute will always apply the remedy when it can be done without injury to any one.

The motion is refused.

Grimke, Legare and Grimke, for the motion.

King contra.

DESPRANG vs. DAVIS.

The act of 1824, which exempts females from arrests under a *Ca. Sa.* does not exempt them from arrests under a bail writ.

Tried in Charleston, in January term, 1825, before the city recorder, Judge Drayton, who made the following report:

"In this case the defendant was arrested by the city sheriff, on the 30th November, 1824, under a writ of *capias ad respondendum* with an order for bail. The defendant gave bail but was afterwards surrendered by her bail on the 25th January, 1825: under these circumstances the defendants council moved for her discharge, under the 4th clause

of the act of assembly, passed on the 17th of December, 1824, entitled, "an act to amend the law in certain particulars." Several grounds were relied upon by the counsel in support of his motion, but as the arrest had been made before the act was in force, I decided that the court could not discharge the defendant. Notice was served upon the recorder that his decision would be appealed from upon the grounds.

1st. Because the act of 1824, by necessary implication, repeals the law giving power to imprison or hold to bail a female on *capias ad respondendum*.

2d. Because the said act by providing that no *capias ad satisfaciendum* against a female shall issue, subsequent to its ratification, discharges an imprisonment or order for bail on a *capias ad respondendum*, issued prior to such ratification.

Memminger for the motion.—Contended that bail, as to female defendants was rendered wholly nugatory by the act of 1824; as the bail is not fixed until the return of the *ca. sa.* (1 *Nott & McCord* 295.)

Power of the sheriff to hold to bail was derived from the act of 1769, (*Public Laws*, 273,) which requires bail to be given for a particular purpose. In this instance no advantage can possibly be derived from it. It was not right to imprison a citizen merely to satisfy a form of law, the reason of which had ceased.

He argued that the act discharges the order for bail given before the act. Penalty can not be enforced after repeal of the act. (5 *Cranch* 281. 6 *Do.* 329.)

Gray contra.—Acts sometimes pass bearing marks of haste, and the court will be cautious of giving construction to impair previous rights; but will preserve both, unless the latter law is clearly repugnant to the former. On the face of the act it was clearly to be seen the legislature intended to abolish only imprisonment under *ca. sa.* for if they had intended it generally, in all cases of debt, it would have been very

easy to have said so. (3 *Black. Com.* 414.) *Ca. Sa.* is a distinct thing from the *capias ad respondendum*: the former to obtain satisfaction of a judgment. Admits that *ca. sa.* could only issue by common law where *capias ad respondendum* would lie, viz: in actions accompanied by force; but the right was gradually extended, and now the *ca. sa.* is not founded on the requisition of bail, but, even, now, where service has been by copy left, *ca. sa.* may be taken out to enforce payment of the judgment.

When the *capias ad respondendum* was issued, the plaintiff clearly had a right to it, and to take it away by an act passed afterwards, must be by a retrospective operation. It takes away a specific remedy, and it requires great latitude to carry it any further.

COLCOCK, J.—The foundation of the argument of the appellant's counsel, is the intimate connexion which subsists between the *capias ad respondendum* and the *capias ad satisfaciendum*. This connexion he has clearly shewn, by his learned research, did once subsist; but by following the changes which have taken place in the doctrines of the law on the subject of process and its operation, it will be found that that connexion has long since ceased.

The body is not now arrested by the *capias ad respondendum*. It is a mere notice to the defendant that he is sued, and that he is required to defend the action.

If the object be to arrest the body, there must be an affidavit and an order for bail. This being the case, it would not follow as contended, that the abolition of the one process necessarily implied the abolition of the other. If the conclusion were just, however, the argument proves too much; for it amounts to this, that the act must be construed to take away the right to sue a female.

Again, supposing the connexion to be what it once was, yet the conclusion would not follow.

Formerly a *ca. sa.* could not be obtained, except where a *capias ad respondendum* had issued; now the abolition

of the latter process does not necessarily imply the abolition of the former. The foundation may remain although the superstructure be raised.

It is contended that without the return of *non est inven-tus* on a *ca. sa.* the bail cannot be fixed, and that therefore it is useless to hold to bail.

Now although it may be useless, as it regards the bail, the case before us shews that it is not useless in other respects. The legislature may have intended that females should not be subjected to imprisonment under a *ca. sa.* and yet thought it not improper to suffer them to be sued and held to bail. If the object had been to relieve them from all imprisonment, they would have used some general language adapted to the purpose. They would not have designated a particular process from the operation of which they should be freed. The language of the act is plain and perspicuous. There is no room for doubt; therefore, no room for implication.

Motion refused.

Memminger for appellants.

Cross and Gray contra.

DARLING BARNES, *et. al.* vs. WILLIAM BRANCH, *et. al.*

In proceedings to obtain partition at law, it must appear on the proceedings that the ancestor died *intestate*.

A guardian appointed by the court of law to superintend the interest of a minor, in the partition of an *intestate's* estate, must have notice of it, and express his intention to accept; and where such guardian has never had such notice, and the court is satisfied injustice has been done the minor in the partition, on motion it will set aside the proceedings; notice being first given to the opposite party.

A judgment may be set aside several years after it has been entered up, on the ground that the verdict exceeded the damages in the writ.

The court of common pleas has always exercised the power of looking into its proceedings, and on motion affording that remedy after judgment has

been entered up, which is obtainable by a writ of error in the English courts; but the court will be cautious in exercising such authority. (a.)

THE plaintiffs in this case, were the children and such of the heirs at law of James Barnes, as had arrived at the years of maturity. William Branch had intermarried with the widow of James Branch. The plaintiffs obtained a rule against the said William and wife, and the minor children of the father James Barnes, to shew cause why a writ of partition should not issue to divide the estate of James Barnes, according to the provisions of the act of 1791. At the return of the rule, the plaintiffs attorney procured Isham Walker to be appointed guardian *ad litem* of the minor children. Isham Walker, however, was not present at the time. He never accepted the appointment, nor did he ever know that such an appointment had been made. An order was nevertheless obtained at the same court for a writ of partition to issue. A writ was accordingly issued directed to certain persons, requiring them to make partition of the land, according to the rights of the respective parties. The commissioners upon a view of the land were of opinion that it could not be divided without injury to one or more of the persons concerned. They, therefore, recommended a sale. The commissioners estimated the land at the value of eight hundred dollars. The land was accordingly sold and purchased by the defendant Wm. Branch for \$20. This was a rule calling on the said William Branch to shew cause why the proceedings should not be set aside for irregularity. The judge in the court below discharged the rule, on the ground that the court had no authority to interfere after the land had been sold and titles executed.

(a) In *Mooney vs. Welch*. (1 Const. Rep. 133.) Judge Cheves suggests that five years might be the time, after which such a motion may not be made; but this rule could only have been suggested in analogy to the statute of limitations, and the common impression has been that the statute allows too short a time to make claims; and indeed, as to lands, the act of 1824, extends it to ten years: and *quære*, whether that time would not be most proper, during which these motions may be made? In *Brailsford vs. Surtell*, (2 Bay 333,) 12 years was said to be too long a time.

This was an appeal from that decision and the motion was now renewed to set aside the proceedings on the ground taken in the court below.

NOTT J.—That the minors in this case have been deprived of their patrimony, without the means or power to protect, it is most manifest. The law considers them incompetent to protect their own interests. The mere nomination of a guardian to act in their behalf, without even giving him notice of his appointment, was worse than mockery. The appointment of a guardian is not a mere nominal thing; it is intended to afford substantial protection to those who are unable to protect themselves. The guardian should have had notice of his appointment, and his consent to take upon himself the execution of the trust, in order that the minors through him might become parties to the proceeding.—Without such notice, the whole procedure with regard to them must be considered as *ex parte*: And our system of jurisprudence must be miserably defective, if it does not furnish the means of correcting such an error. The opinion that the injured parties are remediless, cannot be sustained; and the only question is what is the best method by which redress can be obtained? It is to be presumed that a court of equity could not afford relief. That court will not undertake to unravel the proceedings of a court of law. It will leave that court to judge of its own proceedings and to correct its own errors. In England if a judgment in the King's Bench be erroneous, in matter of fact only, it may be reversed in the same court by a writ of error, *coram nobis*.(b.) Such a writ has never been attempted to be brought in this state that I am aware of. The object, however, has frequently been attained by the more simple and equally efficacious process which has been resorted to in this case. In the case of *Mooney vs. Welsh*, (1 Const. Rep. 133,) the judgment was set aside several years after it had been entered up, on the ground

(b) See the opinions and arguments in the case of *Brailsford vs. Surtell*, (2 Bay, 333.)

that the verdict and judgment exceeded the damages in the writ. That, to be sure, was an error apparent on the face of the proceedings: But the only question is as to the method of bringing the question before the court. That being settled, the subsequent proceedings, whether it be an error in law or fact, may be the same as in the proceeding by writ of error. But there is another ground in this case. It has not been relied on by the counsel; but in a case where such manifest injustice has been done, it would be culpable in the court not to give the parties the benefit of it. It is not alleged by the plaintiffs that their ancestor died intestate; nor does that appear in any part of the proceedings. It does not, therefore, appear that the court had any authority to order a sale of the land; for it is only in case of intestacy that such power is delegated to the court of common pleas. To that point the case of *Spann and Blocker*, (2 Nott & M'Cord, 593.) is a direct authority.

The motion, therefore, is granted.

L. GALPIN vs. L. S. FISHBURNE.

Every application to the court for leave to enter up judgment *nunc pro tunc*, after the year and day, is an application to the discretion of the court, and the Court will be satisfied,

1st. That there was some good reason for the delay,

2nd. That the rights of others shall not be affected; before they will grant the leave. (a.)

And where a judgment was confessed on a writ, there being no declaration or particular cause of action stated, and fifteen months elapsed before the death of the defendant, and two years and some months after his death, the court refused to permit the plaintiff, after such negligence, to enter up his judgment *nunc pro tunc*.

Tried in Colleton District, November term, 1824, before his honor Judge Richardson.

Charles Fishburne in his life time confessed a judgment to the plaintiff, to wit: on the 30th May, 1821, on a writ, without any declaration.

(a.) See *Loyd vs. Howell*, 1 Term. R. 637.

Judgment was never signed, nor entered up, nor any proceedings had subsequent to the confession.

At the last November term for Colleton district the plaintiff obtained a rule against the defendant as administrator of Charles Fishburne, who had died in 1822, to shew cause why judgment should not be signed *nunc pro tunc*.

The defendant shewed for cause that Charles Fishburne had been dead two years and upwards; that in marshalling the assets of his estate, he had no notice of this judgment, and that, therefore, to suffer the plaintiff to enter up judgment *nunc pro tunc* would give an undue preference to that judgment, or make him liable to a *devastavit*, or both.

The rule was made absolute by the presiding judge from whose decision the defendant appealed and moved the court of appeals to set aside the same:

1st. Because after a year and a day, the plaintiff has no right to proceed, but by leave of the court.

2nd. Admitting that in ordinary cases the court have the power to grant such a motion, that power ought not in this instance to have been exercised.

Argued 17th February, 1825.

Martin, for the motion—cited *Tidd* 845-7. It is a matter of discretion to give leave to enter up a judgment *nunc pro tunc*, and it will be refused when the rights of defendant may be compromised. The part, should have applied by *sci. facias*, (*Archbold*. 76. 78,) to which payment might be replied; but not on motion.

The writ on which the judgment is confessed was not entered in the sheriff's office nor filed in the clerks; it is therefore no record of the court and the confession is no more than a promise.

Clark, contra.—(1st. *Tidd*. 504.) *A cognovit actionem* is final, and plaintiff may enter up judgment *instante*. (1 *Dunlap's Prac.* 357. 1 *Cains'*, 498. 6 *Johnson* 325. 2 *Tidd* 846. 6 *Term*, R. 6. 2 *Lord Ray*. 766. 849.) Judgment confessed by a warrant of attorney, after defendants death, is good. (*Executors Lynch vs. Executors Bay*. 1 *Bay* 444.)

Martin in reply—By act of 1785, (1 *Brev. Dig.* 436 *Public Laws*, 38,) all warrants of attorney to confess judgments before action brought are void.

COLCOCK J.—Every application to the court for leave to enter up judgment *nunc pro tunc*, after the year and day, is an application to the discretion of the court; and the court will be satisfied,

1st. That there was some good reason for the delay; and,

2nd. That the rights of others shall not be affected, before they grant the leave.

In the case before us, no satisfactory reason is shewn why the plaintiff did not proceed.

The defendant lived fifteen months after the confession; which embraced two terms; and two years and some months after his death were suffered to elapse before any application is made.

The court will lend its aid to advance the purposes of justice, where the party applying has used due diligence; but but it is never disposed to assist one out of a difficulty which is the result of their negligence.

But this is not all; the plaintiff not only asks the court to secure to him those rights which he may have lost by his own negligence, but to give him a preference over others who may have been diligent in the pursuit of their rights, which they would not do under any circumstances.

The counsel for the plaintiff laid down the position that a confession of judgment was final and does not abate; and referred to some authorities which support the position; but it is only in such cases and those provided for by the statute of Charles 2d: that such an application as the present one can be made. (a.) The general rule of law is that the death of a

(a.) 17 Car. 2, Ch. 8. (Tidd, Prac. 847.) which statute enacts, that where either party dies *between verdict and judgment* "that his death shall not be alleged for error, so as the judgment be entered within two terms after the verdict."

The general rule of law is that the death of a sole plaintiff or defendant, before final judgment, abates the suit (2 *Tidd*, 845-6.)

Again: I think in a case like the present the court would not suffer a judgment to be entered up after the death of the defendant. The proceeding is uncertain and wholly irregular. It is not like the case of a *cognovit actionem* regularly entered on the record. The defendant on the back of a writ confessed judgment for so much on the case. What case? Was it on a note or an account? and what note or account? How would the record be made up. It is manifest that in such case the plaintiff might use any cause of action of that amount. What could there be which would prevent the plaintiff from making out an account for the sum for which judgment was confessed and then suing the executor or administrator on the note, on which it was intended to confess the judgment.

On the whole, there has been so much negligence and so much irregularity in the proceeding, that the court feel constrained to grant the motion, for the reversal of the judgment below.

Elmore & Martin for the motion.

Clarke contra.

ALEXANDER CORRIE vs. DAVID FITTS, same vs. CHARLES GIVENS.

When a judgment is rendered against a defendant he is liable to pay the costs and from him the clerk should collect them. If he be insolvent and unable to pay them, then the clerk may have recourse to the plaintiff, and may maintain his action against him for services performed.

In this state, costs abide the determination of the case, and the clerk may collect his own:

It seems the plaintiffs have no power to receive or collect the costs of the officers of court.

Tried in Beaufort district, in November term, 1824,
before Mr. Justice Richardson.

These were too cases of summary process to recover fees due to the plaintiff, while he was clerk of the court of common pleas for Beaufort district, in several actions to which the said Fitts and Givens were plaintiffs.

The evidence adduced by the plaintiff in the first case, was: 1st the original judgment of David Fitts, vs. —: and 2dly, the execution in the same case marked "satisfied." This the presiding judge decided was insufficient to prove that Fitts had received the clerks fees, taxed on the judgment of Fitts vs. —, and that he was not liable to the clerk, unless he had received them, or it appeared that the defendant was insolvent. In the second case, the plaintiff produced, first the original judgment of Charles Givens vs. —, but no *fi. fa.* and secondly, the sheriff's receipt book for the debt, paid to C. Givens, with attorney's costs, paid to the attorney on record, but no receipt appeared for the clerks costs. On this evidence the presiding judge held that neither of the defendants were liable to the clerk; as it was the rational presumption that the sheriff had the clerk's costs, and to him the clerk should look.

Appeals were now made in these cases on the following grounds: In the first case,

1st. Because the plaintiff produced sufficient proof to establish his right to recover his fees from the defendant, by adducing the judgment rolls in the several actions in which said Fitts was plaintiff.

2nd. Because once having proved his right of action against the defendant, the plaintiff threw the burden of proof on the defendant, to shew that the fees which were the subject of action had been paid to Corrie, the plaintiff.

3rd. Because the presiding judge decided that the return by the sheriff of satisfaction of debt and costs on the execution issued in the actions in which Fitts was plaintiff, afforded a presumption that the clerk's costs had been paid by the sheriff to the clerk.

4th. Because the plaintiff in every action is responsible to the clerk for his fees in all cases, whether the plaintiff has himself received those fees or not.

5th. Because the sheriff in collecting the clerk's costs in every action, does not act as the agent of the clerk, nor collect the clerk's fees for him, but acts for the plaintiff in the action as his agent, and collects for him the fees which the plaintiff is supposed and ought already to have paid to the clerk; and because there was no evidence that the sheriff had collected the clerk's fees, or paid them to him.

In the second case, on the grounds:

1st. Because the plaintiff in every action is responsible to the clerk for his fees in all cases, whether the plaintiff himself has received those fees or not.

2d. Because the production of the judgment rolls, in the several actions in which Givens was plaintiff, was sufficient to prove the services of the clerk for the benefit of Givens, and to establish the clerk's right to recover his legal fees, for those services from him, for whom they were rendered.

3d. The performance of the clerk's official services for the benefit of Givens, having been proved by the records of the court, the clerk's right to recover his fees was complete, and the burden of proof was thrown upon Givens, to show that those fees had been paid to the clerk entitled to receive them.

4th. Because the presiding judge decided that the executions issued in the several actions in which Givens was plaintiff ought to have been produced, to show whether or not the clerk's costs had been collected; and that not producing the executions was suspicious and created a presumption that the costs had been paid, though there was no other evidence to that effect.

5th. Because, if the executions ought to have been produced, it was the duty of defendant to produce them, as the plaintiff had proved his services for the defendant, and was entitled to recover for them, on his implied contract.

6th. Because the presiding judge decided that the sheriff's books containing the receipt, of the plaintiffs, of their debts, and of the attorneys of their fees, but not containing the receipt of the clerk for his, did not rebut the presumption arising from the return of the executions, "satisfied," that the clerk's fees had been paid to him.

Colcock J.—The act of 1791 fixes the fees of all the public officers of the state; and by the 27th section declares that at whatever stage any suit may cease or determine the attorneys, clerks and sheriffs shall have their fees taxed; and on nonpayment thereof, execution may be issued against the party from whom they are due, and be lodged with the sheriffs of their respective districts and returnable at the ensuing return day; and the sheriff for his trouble in collecting such fees shall be allowed a commission of two and one-half per cent, to be paid by such defaulter. And by the 29th section it further declares that the several clerks and registers of the courts of justice, and sheriffs throughout the state, shall collect in and receive their own fees from the different suitors or persons who are liable to pay the same, in the said courts of justice respectively. (*1st Brev.* 340 348.) From whence it appears, that clerks are required to collect their own fees, and clothed with ample power to do so. Although, then, the judgment states that the costs are adjudged to the plaintiff, he has no power to collect or receive the costs of the officers of the court; it is mere form. By the practice in England, the plaintiff pays to the clerk of the court his costs at every stage of the case as it proceeds, and there the costs, when recovered, are correctly stated to be plaintiffs costs, which he has expended, &c. and hence the form of the judgment: but here the costs abide the determination of the case and every officer, as before shewn, is required to collect his own. When a judgment is rendered against a defendant, he is liable to pay the costs; and from him the clerk should collect them. If he be insolvent, and consequently unable to pay them, then the clerk may have recourse to the plaintiff and may

maintain his action against him for services performed; as decided in the case of the same plaintiff vs. *Jacobs & al.* (*Hunter's Reports*, 326.) at the spring sitting of 1824. Now what are the facts of these cases as stated by the presiding judge. In the first case an execution was produced with satisfaction indorsed thereon: This evidence so far from proving that the defendant could not pay, was conclusive that he had paid, and paid too to the agent of the plaintiff, for the sheriff must be so considered. In the second case, the judgment was produced but no execution, and the sheriff's receipt book shewing that the debt was paid to the plaintiff, and the attorney's costs to him: Now this was no evidence of the inability of the debtor to pay; on the contrary, it affords a strong presumption of actual payment to the sheriff. Indeed, I am at a loss to conceive why these actions were brought against the defendants when the plaintiff had such evidence in possession against the sheriff.

The motions are dismissed.

Alston & Cummins, for Appellants: *Morrall*, contra.

ANTHONY CHANET vs. D. & B. VILLERONIER.

A native of France, who came into this country as early as 1774, and resided here ever since, exercising all the rights of citizenship, is a citizen by virtue of the Declaration of Independence, and may take and hold lands by inheritance or purchase.

Where a testator devised lands, "to be sold at the discretion of his executors," to be vested in securities for his nephew, &c. and appointed two executors, one of whom only qualified, and the other removed from the state, he alone, who qualified, may sell and convey the lands.

A naked power given to two by name, must be executed jointly, but when the power is coupled with a trust, and it is evidently the intention of the testator, that the trust shall be executed, in order to effectuate some provisions of his will, then the power may be exercised by one executor, the other not having qualified; the power being *virtute officii*, and not personal.

Trespass to try title.

Tried before Mr. Justice Waties, who made the following report:

"The plaintiff claimed certain lands which were devised by *C. De Tolinaire*, deceased, "to be sold at the discretion of his executors," and the proceeds to be vested by them in public securities for the use of the male children of his nephew *L. F. De Tolinaire*. The plaintiff had purchased the lands from Hugh Patterson, the only qualified executor of *C. D. Tolinaire*. Another executor was appointed by the will, but he went to France without having qualified, where he is now living, but has declared his determination not to return to this state. The lands were acquired by *Mr. De Tolinaire*, as heir to his daughter, in whom they vested under a marriage settlement, made on her mother, and who died intestate as to her real estate. The defendants claim them as the next of kin of *Miss De Tolinaire*, the daughter, on the ground that her father was an alien. It was also contended by their counsel that the plaintiff's title was invalid, because the power given to the executors of *Mr. De Tolinaire* to sell was a joint one, and the sale of the lands to him was by one executor only.

I was of opinion that these objections were not well founded.

The first was fully answered by shewing that *M. De Tolinaire* came from France to this country in the year 1774, had ever since resided here and exercised all the rights of citizenship, and which, I thought, had been virtually conferred on him by the declaration of independence.

The second objection was of more weight, but did not appear to me to be applicable to this case. A naked power given to two persons by name must indeed be executed jointly, but where the power is coupled with a trust, and it is evidently the intention of a testator, that his lands shall be sold in order to effectuate some provisions of his will, there the power may be exercised by one executor, if only one qualified and the others renounce or refuse to act; for the power in such a case is not personal, but given *virtute officii*, (*Powell on Devises*, 297. 307. *Howell vs. Barnes*, *Cro. Car.* 382.

Franklin vs. Osgood, 14. *Johnson R.* 553. *Jackson vs. Pitt* 15. *Johnson R.* 348.) (a.) I considered it also a case with in the statute 21, *Henry 8th*, made of force here, (*P. L.* 45.) which authorises a qualified executor to act where the testator renounce or refuse to act. In the present case the object of the testator was to distribute his estate among the children of his nephew, and he directs his lands to be sold for that purpose; but one of his executors has put it out of his power to act by removing out of the state, which is equivalent to a renunciation of his executorship; it is, therefore, indispensable that the qualified executor should exercise the power of selling or the provisions of the will could not be executed. I presented these views of the case to the jury and they found a verdict for the plaintiff.

A motion for a new trial was made on the following grounds:

1st. That the plaintiff could not prevail; *De Tolinaire* being an alien.

2nd. That Patterson had no power to convey; the estate being in trustees under the marriage settlement, or it vested in the *cestui que use*; that Patterson alone could not convey, the other executor named having never renounced.

Argued 9th March, 1825.

J. B. White, for the motion.—The deed of marriage settlement is dated 2nd January, 1776; date of the will, is 3rd January, 1816: The former conveyed to trustees for the use of the marriage of the daughter. The will directs all the estate real and personal, to be sold at the discretion of the executors. The executors had no power to convey: He had but an equitable estate, the fee being in the trustees, under the marriage settlement, and the executor could not convey unless the other had renounced. Power to sell, under the act of 1787, (*Pub. Laws*, 423.) only relates to cases where the testator has directed a sale, but has not said by whom to be made. There, a majority of such as qualify may act.

(a.) See also *Zebach vs. Smith*, (3 Binn. Rep. 69)

under the statute 21, *Hen. 8, c. 4. (Public Laws, 45.)* where, the devise is to executors to sell, those who qualify may convey, the others refusing. But here the power is joint and must be jointly executed; for the words of the will are, "*executors herein after mentioned,*" which designates them as persons. (2 *Swinb.* 715 to 761.) Lands descend to the heirs, therefore, authorities to sell should be strictly construed, (2 *Swinb.* 730, n.) If a devise be to A. B. C. to sell and one die, the others cannot sell.

The refusal to serve as executor must be formal—(*Grimkie Ex.* 164.) and must be entered of record in court. (*Toller* 41-2. 2 *Swinb.* 865, n. *Wentworth Ex.* 38. 2 *Rob. on Wills*, 42.) Renunciation must be entered in the ordinary's office and a verbal one is not sufficient—(*Wentworth* 38.) The other executor here went away, knowing of his being appointed, and might come here to-morrow and assume the executorship. But this is an equitable estate, notwithstanding statute of uses. Something should be done to transfer the estate. (2 *Fonb.* 136) *De Tolinaire* was then an alien; use must be executed. (2 *Fonb.* 12.) The former decision was that Patterson could not maintain the action. He referred to cases relied on in 14 *Johns, R.* 527. and remarked that a naked power does not survive. If any trust to be executed, the power survives. An interest was conveyed; (15 *Johns*, 346.) an interest coupled with the power. Devise is to sell and to vest proceeds in public stock, and give to aliens, for *De Tolinaire* is an alien; was once an alien, and something must be done to make him a citizen. Does the mere being here at the declaration of independence make him a citizen? There are but two ways to create a citizen; by letters patent, or act of parliament. (4 *Cranch* 321. 316. 97. 1 *Munf.* 218.) He is not a subject of Great Britain, claiming under treaty. Time alone cannot make a citizen.

NORR J.—The court concur in the opinion of the court below.—Motion refused.

White, for motion.

— contra.

J. P. CHATZEL & Co. vs. JOHN & CURTIS BOLTON.

Quere, If when an attachment is levied on the property of one copartner, or joint owner, the whole of the property may be taken into possession and sold, and the whole delivered to the purchaser? (p.)

But when the funds are reduced to money, the court will only order so much to be paid over as belongs to the partner sued, and may at their discretion order seasonably to be given for that party, until settlement between the partners.

The pendency of a suit in another state is no reason, of itself, for the delay of a cause in this state; but when it is obvious to the court, that their decision will affect rights to be ascertained by the determination of such suit, and where such rights are involved in the issue here, they will grant a reasonable time to obtain such determination.

Tried before Mr. Justice Huger, who made the following report:

"This was an application to the court for certain funds, which had been paid into court by John Robertson as Guarantisor. It appeared that J. P. Chatzel, John Woodward, Alexander Cranston, and Andrew Alexander had been partners in trade in Lexington, Kentucky, under the firm of Chatzel, & Co. It also appeared that A. Cranston and A. Alexander were partners in trade in New-York under the firm of Alexander, Cranston, & Co. The first copartnership was dissolved on the 1st November, 1817. Subsequent to this dissolution, the New-York house filed a bill in the circuit

(a) See on this litigated subject, *Heydon vs. Heydon*, 1 Salt. 382; *Duchéat vs. Clément*, 1 Show. 172; *Jepsey vs. Butler*, 2 Lord. Ragsdale, 571; *Edloe vs. Davidson*, Doug. 650; *For vs. Hambury*, Coup. 445; 1 East. 363; 1 Comyns, 277; *Pierce vs. Jackson*, 6 Mass. Rep. 242; *Fisk vs. Heroich*, 6 Mass. 271; *Phillips vs. Bridge*, 11 Mass. Rep. 242; *Goodwyn vs. Richardson*, 11 Mass. Rep. 469; *McComb vs. Hudson*, 2 Dall. 78; *Pence vs. McCarty*, 1 Dall. 354; *Sergeants Law of Massachusetts* 78, 80; *Usser vs. John*, 4 Dall. 496; 1 Binn. 191; *Wallace vs. Patterson*, 2 Harr. and M'Hen. 463; *Church vs. Knox*, 2 Conn. Rep. 514; *Gilmore vs. N. A. Bond*, Comp. Peters 400; *Shawer vs. White* 6 Munf. 110.

Now the interests of the different partners, that of one being levied on, shall be regarded in equity, as against execution, and attaching creditors, besides the above cases, see *Taylor vs. Fields*, 4 Ves. 396; *Went vs. Skipp*, 1 Ke. 239; *Dutton vs. Morrison*, 17 Ves. 201.

See all the cases and comments upon them in 1 *Montagu vs. Partnership*, 20. Watson 72.

court of the United States for Kentucky, against the Kentucky house. After hearing the bill and answer, the circuit court appointed Chatzel to collect the funds, and pay them away, in conformity to an account to be stated by commissioners appointed for that purpose. Before these funds were all collected, *John and Curtis Bolton*, who are creditors of the firm in New-York, attached funds belonging to the Kentucky firm, in the hands of *Robertson* in Charleston, who paid the same into court. The question was involved in some difficulty. It did not and could not appear to what portion of this fund the New York firm was entitled, before the accounts of the Kentucky firm were stated, and only so much as they might be entitled to, was subject to the attachment of the Boltons. It had been decided that these funds were liable to this attachment, but not to what amount the Boltons were entitled. (*See the case in 2 McCord's Rep. 478.*) The creditors of the Kentucky firm, had a prior claim to the creditors of any individual of that firm; to order, therefore, the whole of these funds to be paid to the Boltons, was to postpone the creditors of the firm, to the creditors of an individual of that firm. I, therefore, refused the application on the part of the *Boltons*, for the whole amount; but as it appeared to be admitted that the New York firm would in all probability be entitled to a moiety of these funds and they must continue unproductive as long as they remained in court, and would be as safe in the hands of the Boltons, provided ample security were taken for their forthcoming, should it hereafter appear, on the settlement of the concerns of the Kentucky firm, that so much would not be due to the New York firm, I gave the order complained of; an order, as I supposed, at the hearing of this case, suggested and desired by the counsel for the Boltons, with which, if they did not approve, they were not bound to comply, and with which if they did comply would seem to imply consent."

A motion was made to set aside the decision of his honor, and the brief states, that: "J. & C. Bolton in pursuance of the decision of this court in their favor, in May term,

1823, applied in the January term, 1823, to have the money, which had been paid into court by the garnishee, paid over to them. The presiding judge refused it, and gave the counsel of J. P. Chatzel & Co. until the next term. In the October term following, the same motion was made, but further time was given. On the 24th February 1824, a motion to the same effect was again made, whereupon it was again refused, and time granted, until the May term, following; when the application was renewed before his Hon. Judge Huger, who refused the motion, but gave leave to J. & C. Bolton, to enter an order to take out one half of the amount on giving security.

From this order an appeal is now made upon the following grounds:

1st. Because the order should have embraced the whole fund in court, and could not upon any known principles of law, have been limited to a moiety of the sum attached.

2d. Because the act does not justify the demand of security, inasmuch as the three requisites prescribed by the 3d clause of the attachment act, (*P. L.* 188, and 1 *Brev.* 35, 83,) where the attaching creditor receives the property attached on giving security, had been fully satisfied. The three particulars of the condition of the recognizance are:

1st. That the attaching creditor should prosecute his suit with effect. This, J. & C. Bolton had done; for they had established their debt, and entered a judgment on 17th June 1820.

2d. That the property attached should be forthcoming, if the absent debtor should appear within a year and a day, and discharge himself of the plaintiff's demand. This Alexander Cranston & Co. the absent debtors had *not* done.

3d. That if the absent debtor should not so appear, the balance of property so attached and delivered on security, should be delivered over to the clerk of the court, after payment of such sum, as should be awarded to them by the judgment of the court. Now, the whole fund attached, (*viz.*

\$4,890 17.) was less than the amount of the judgment, (viz: \$6,108 93.)

It is therefore, insisted, that the plaintiffs ought not to be required to give any security, having in a case perfectly analogous to that contemplated in the 3d section complied with all the requisitions of the law."

Argued, 3d March 1825.

Grinke, for the motion.—It has been decided that this property is liable to attachment; and it is not affected by the proceedings in Kentucky. (1 *John. Ca.* 345. 9 *John. Rep.* 220.) If the other party claim, they must shew that they have used due diligence. Attachment is a substitute for bail. The judgment is already taken, and has the efficacy of any other judgment. (3 *Bos. and Pul.* 288. 2 *John. Ch. Ca.* 548.) No reason for giving parties time. They are in default.

Petagna, Attorney General, contra.—By the decree in Kentucky, appointing Chatzel receiver, all other persons are enjoined from receiving. Hanna is put in the place of Chatzel. On the subject of delay referred to former case, in 2 *McCord's Rep.* 478. The decision there is, that the rights of one partner may be attached subject to the rights of others. It is decided that the *corpus* may be sold. Can execution creditor against one joint owner, take property from the possession of the other? (16 *Johns.* 106 note.) Result seems to be that the interest of a joint owner may be sold, whatever it may amount to, after settlement of concerns. No mode in which one joint owner can divest the possession of the other. Possession should not be changed until the right be determined. (16 *John.* 102. *Smith's Case.*) Attachment discharged as being on joint property. (1 *Garrison* 367.) Partnership goods not allowed to be taken out of the possession of the other partners for the debt of one. The sale amounts to nothing but an assignment of the partners interest and the purchaser comes into his shoes.

Grinke, in reply.—Cited (2 *Bacon* 716, new ed.) various authorities to shew that the sheriff seizes the whole of joint property, and delivers the whole, which constitutes vendee

joint tenant. This money it is the plan of the property. Expressly that case in 2 *Dall.* 277. *Topham vs. Chapman*, shows attaching creditor may have rights paramount to those of the assignee or party.

Concord, J.—In discussing the first ground of objection to the decision of the presiding judge below, the plaintiff's counsel have presented a question of no ordinary difficulty. It is contended that when an attachment is levied on the property of the copartner or joint owner, the whole of the property may be taken into possession and sold, and the whole of course delivered to the purchaser; thus divesting the copartner or joint owner, who may be in the possession, of such possession, against his will and in opposition to his interest. And it is concluded from this doctrine, that the court in the case before us, is bound by analogy to order the whole of the money to be delivered to the plaintiffs in this action, and let them account to the house in Kentucky for their share of it. It is however not necessary to investigate this subject, in order to decide this case; for supposing the plaintiff's counsel to be right, it does not follow that the court should order the whole of this money to be paid to his clients. The ground of necessity may excuse the law for divesting one of his possession under the circumstances of this case, and even for selling his property at less than its full value; but when it is reduced to money, it is not easy to discover any reason which would authorize the court to pay over to the creditor of his copartner, that portion of the proceeds which belonged to him. The law will not interfere with the rights of third persons, farther than is indispensably necessary to the administration of justice. It may say to him, who is divested of his possession, for the purpose of compelling a payment of his copartner's debts, you have by your own act, subjected yourself to this inconvenience or loss. But I can find no satisfactory reason why he should be sent to the creditor of his copartner for his share of the proceeds of the property. His property being taken from him by the law, he

may say with great force, to the law I look for its value. If I have subjected myself to a partial loss and some inconvenience, it does not, therefore, follow that I am to be subjected to still greater inconvenience, and perhaps to a total loss. There can be no doubt that the pendency of a suit in another state, is no reason of itself for the delay of a cause in this; but when it is obvious to the court that their decision will affect rights to be ascertained by the determination of such suit, and where such rights are involved in the cause here, they will grant a reasonable time to the parties interested to obtain such determination. Much time has already been given to the house of Chatzel & Co. but they again present a strong claim to further indulgence, and the court can only grant it on conditions. The plaintiffs on their part have substantiated their debt, which exceeds the whole amount of the fund attached; they have complied with the requisitions of the attachment act, and consequently are entitled to the money. While, therefore, the court is disposed to grant further indulgence to the house in Kentucky, they cannot be unmindful of the strong claim of the plaintiffs; but as they are unable to make a final determination on the respective claims of the parties in interest, they conceive they cannot make a more just and reasonable order, than that which was made by the presiding judge below. They, therefore, dismiss the motion and confirm the order made by the circuit judge.

HAMILTON vs. REEDY.

A landlord can not distrain upon any other property than *personal chattels*. But he can not distrain upon *personal chattels* after they are in the custody of the law; viz: as after being levied on under a *fi fa*. By the statute of Anne, no *goods or chattels* taken on any lands leased for life, years, &c. shall be taken in execution, unless the party, at whose suit the execution is sued, before removal of goods, pay to the landlord the arrears of rent, if not exceeding one year's rent.

But the same right of the landlord does not exist as to *chattels real*; but *chattels real* may be sold exclusively for the satisfaction of the execution. The landlord must give the sheriff notice of his claim for rent. (a.)

This was a rule upon the city sheriff of Charleston, tried before the Recorder of the city court, who made the following report:

"The actor had leased to the defendant, Tho's Reedy, a lot of land in Charleston for a term of years, for a certain rent payable annually. Subsequently to the execution of this lease, the plaintiff, James Hamilton under a judgment, obtained by him against the defendant, sued out a writ of *feri facias*, under which the lease-hold estate purchased by Reedy from the actor was sold by the sheriff and purchased by the actor. At the time of this sale, more than a year's rent was due by the defendant, of which the actor gave regular notice to the sheriff, and demanded from him the amount of a year's rent, pursuant to the statute of Anne. The execution creditor resisting this claim, the sheriff refused to comply with it; upon which the actor took out this rule to compel the sheriff to allow him the rent he demanded. The execution creditor contended that a landlord was only entitled to require from the sheriff a year's rent when personal property had been levied upon and sold under a *feri facias*, and that as in this case the property sold was a chattel real, the proceeds must be paid over to the creditor, without any deduction for the rent in arrear. The counsel for the actor (who was the landlord) insisted that the sheriff was bound, both by the common law, and under the statute of Anne, to pay to him a year's rent; although the property sold was a chattel real; and he cited a number of cases to support this position. In giving my decision in this case, I stated that

(a.) I presume nothing more is meant by the court, than that the sheriff must know that there is rent due to the landlord; as in *Andrews vs. Dixon*, (3 Barn. & Ald. 645,) the court held, that "where a sheriff with the knowledge that there is rent due to the landlord, proceeds to sell the tenant's goods by virtue of a writ of *fi. fa.* without retaining a year's rent, he will be liable for it, although no specific notice has been given to him by the landlord."

whilst the feudal system prevailed in England in its full force; the non-performance of any of those feudal services, which were reserved, among which rent was included, occasioned an absolute forfeiture of the feud and a reversion of it to the lord. The rigor of this law was afterwards mitigated, and the lord was restrained to an entrance upon the land and taking it into his possession, until he obtained satisfaction. But this practice, after some time, was changed, and in its stead was substituted a right to seize the cattle and other moveables found upon the land, and to detain them as a pledge, until the rent was discharged. The exercise of this right being found to be oppressive and injurious to tenants, various statutes were passed upon the subject, until at length the law of distress became such as it is at the present day. A distress was defined to be "the taking a personal chattel out of the possession of the wrong doer into the custody of the party injured, to procure a satisfaction for the wrong committed." (3 *Blackstone's Comm.* 6.) The same author in page 7. says, "all chattels personal are liable to be distrained, unless particularly protected or excepted." It thus appears by the ancient law, that where rent was not paid, the land reverted to the lord; that afterwards, when rent was due, the land was held by the lord until his demand was satisfied; that to this right succeeded the power of levying upon personal chattels to be held by the lord as a pledge, until his rent was paid, and that, at a later period, the doctrine of distress was introduced as it now prevails. During these various practices and usages (before the statute, which I shall presently refer to) no provision existed respecting the interfering claims of a landlord and a creditor of the tenant, who, under an execution, might have levied upon the property of his debtor. It was an ancient rule of the common law, which still remains unimpeached, that goods in the custody of the law cannot be distrained. If, therefore, the sheriff, under a *feri facias*, levied upon the goods of a debtor, being, when levied upon, in the custody of the law, they are

exempt from distress by a landlord. But altho' the landlord cannot take such goods into his hands, as a distress, yet a provision contained in the statute 8 Anne, c. 14. (of force in this state) has given to him, to a certain extent, a lien on his tenant's goods, when taken in execution. That statute enacts that no goods or chattels taken on any lands, leased for life, years, &c. shall be taken in execution, unless the party at whose suit, execution is sued, before removal of the goods, pay to the landlord the arrears of rent, if not exceeding one year's rent. So far as this statute extends, the landlord is relieved: In all other respects, his right and those of the execution creditor, remain as they existed before the statute. In the exposition of this statute, it has been determined, that the landlord, to avail himself of its provisions, must give notice to the sheriff of his claim for rent. From this view of the law of replevin, the following conclusions, seem to me to result:

That the landlord cannot distrain upon any other species of property than *personal chattels*;

That he cannot distrain upon *personal chattels* after they are in the custody of the law;

That where *personal chattels* upon the premises are sold under a *fi. fa.* the landlord, upon giving notice to the sheriff, is entitled to receive from him one year's rent, if so much be due at the time of the sale; and,

That after a sale of a *chattel real* by the sheriff, no such right is given to the landlord, but the whole of the proceeds must be paid to the execution creditor.

For these reasons, I dismissed the rule, and ordered the whole proceeds of the sale to be paid to the plaintiff."

From this decision, the actor appealed, on the ground, that the sheriff was bound, under the statute of Anne and the common law, to pay a year's rent from the proceeds of the sale of the lease, though it be a *chattel real*.

Argued 11th March, 1825.

Gadsden, for the motion—Contended that the term

was pledged for the rent. (2 *Bacon, Ab.* 341. *Tit Distress.*) The proceeding by distress is taken from the civil law, and is a substitute for forfeiture. The lands leased are hypothecated to the landlord for the payment of rent: so the whole profits of the land, which must include this term. Formerly the nonpayment of the rent was a forfeiture of the lease, but distress was substituted for this forfeiture. (*Gilbert on Distress*, 3.) Distress is the taking of chattels; which comprehends all chattels. (*Woods Inst.* 199. *Finch*, 135.) *Coke*, (*upon Lit.* 46. 47. a.) defines a distress to be of a thing whereof a valuable property is in somebody; which will comprehend a lease. The old forms of distress conformed to that of a *fi. fa.* A *fi. fa.* may take a term, and why not a distress? Besides, possession can be taken by the sheriff of a term. (8 *East*, 484. *Noy*, 43.) A lease may be sold under a *venditioni exponas*. (*Dyer.* 363. a.) Besides, the statute of Anne is susceptible of this construction: For whatever is within the intention of a statute, is as much within the statute as if it were expressly included. (*Plowd.* 366. 10 *Rep.* 10.) The statute of Anne must be construed liberally to give a specific lien. (2 *Wilson*, 71.) He cited also, 2 *Bacon*, 74, *Tit. Covenant.* 2 *Binney*, 146. 2 *Tidd*, 849. 2 *Black. Com.* 416-7. *Gilbert on Rents*, 86.

Dawson, contra—At common law the lien does not attach till rent is due. The lien is not taken as a satisfaction, but as a security. It is in the nature of a pledge, which is only in reference to chattels, (2. *Bacon, Ab.* 349.) Before the statute the landlord lost his lien if execution issued. To remedy this the statute was passed. There is no lien upon a lease, like that of a vendor's, where the purchase money is unpaid. The statute included no other property than such as was distrainable at common law. It was only to make the lien available. (2 *Bacon*, 344.) The statute of *Phil.* and *Mary* and others, against removing goods, regard things distrainable as being only moveables. Besides the writ of *replevin*, which is to take goods out of the hands

could not apply to a term. (*Bacon, Dist.* 252-3.) If the term might be distrained, so might fixtures. (*Bac.* 343. 2 *M'Cord* 330. 423.) Besides the statute is too plain for construction. (1 *Const. Rep. Tread.* edition, 119-20 and 21, 2 *Brevard Dig.* 185. title, *Rent.*

Grimke, on the same side—The right of distress is different from hypothecation. It is of feudal origin. *Fieri facias* has been confounded with *levari facias*. The landlord never had a right to take a growing crop till the statute passed. The sheriff can not turn the lessee out of possession. Vendee must bring ejectment. (2 *Bac.* 714. title, *Execution.*)

Per Curiam.—The opinion of this court, concurs with that delivered by the Recorder. The motion is therefore refused.

DAVID PEMBLE, Assignee of the Sheriff, vs. HENRY CLIFFORD.

An action cannot be sustained on a replevin bond, against the securities, unless a judgment (of *non pros.* or otherwise) has been obtained in the replevin suit, and a *retorno habendo* ordered.

Tried before Mr. Justice Richardson.

This was an action of debt on a replevin bond, brought by David Pemble, assignee of the sheriff, against Henry Clifford, the security. In the original replevin suit, a certain James D. Cogan, was the plaintiff. The writ was issued, but no declaration was filed, nor subsequent proceedings had thereon. The bond being considered as forfeited, this action was brought against Henry Clifford, the security. The defendant filed a special demurrer, which was argued in May Term, 1824. This demurrer contained, amongst other exceptions, the ground that an action could not be brought on the replevin bond, against the securities, unless a judgment had been obtained in the replevin suit and a *retorno habendo* awarded. The demurrer was supported. A notice was then served on the presiding judge, that a motion

would be made, at the next court of appeals, to reverse this decision, on the ground, that the presiding judge erred in deciding, that a *retorno habendo* should have been ordered and a judgment of *non-pros.* entered up, before an action could be brought on the replevin bond against the securities; and the case was submitted, without argument.

NORT, J.—This case is settled by the case of *Thomas Duggan vs. Alexander England.* (*Harper's Reports*, 217.) The motion is, therefore, refused.

JOHN & G. DEBOW *ads.* SAM'L. M'CLARY & WM. APPLGATE.

The statute, of George 2, which requires two securities to a replevin bond, is not of force in this state.

If the law did require two securities, it would be too late after judgment to take advantage of such omission.

This was a motion for arrest of judgment, before Judge Waties, who dismissed the motion; on the ground,

That the objections made to the replevin bond came too late after judgment obtained.

An application was now made for a new trial on the grounds:

That the bond, on which this action was founded, had but one security upon it, whereas the law requires two securities on bonds of this nature, viz, on replevin bonds.

NORT, J.—This court concur in opinion with the presiding judge. It may further be observed, that the statute of George the second, which requires two securities to a replevin bond, is not of force in this state. (a.)

Sargent, for the motion.

Hunt, contra.

(a.) See *City Council vs. Price*, 1 *M'Cord's Rep.* 299, where an intimation was made, that the 2 *Geo. 2. c. 19*, was of force in practice, which by this case is decided not to be.

GIBSON, FALCONER & Co. vs. WM. STEELE.

Where a petitioner for the benefit of the prison bounds act, was convicted before a jury of fraud, but a new trial was granted to him by the consent of his suing creditor, the court held, he was not deprived, by such conviction, of the benefit of the act, under a *ca. sa.* by another creditor; as the new trial annulled the verdict of fraud, though it was obtained by consent, and not upon argument; and the parties stand as before the trial.

If the appeal court is deceived when they award a new trial, it is not for the court below to reverse their order; but for that tribunal, if they think proper.

Tried before the Recorder, Judge Drayton. This was a rule to shew cause why a debtor should not be remanded to gaol; and the case was as follows:

In July, 1823, William Steele applied for the benefit of the prison bounds act. His motion was opposed by certain judgment creditors upon the ground of fraud. They filed their suggestion, upon which, in the same month, the question of fraud was submitted to a jury; by whom the debtor was found guilty of the fraudulent act contained in the 5th specification of the suggestion.

From this verdict the debtor appealed.

On the 4th October, 1823, a motion was made before the recorder for his discharge; when it appearing that he had satisfied the creditors who had filed the suggestion, and that they consented to his being liberated, he ordered him to be discharged. In January, 1824, a new trial was granted by the constitutional court; the entry upon the docket being "new trial by consent."

In June, 1824, the debtor was arrested under a *ca. sa.* at the suit of Gibson, Falconer & Co. when he again petitioned for the benefit of the prison bounds act.

On the 11th June, 1824, he was brought before the recorder, when his counsel moved for his discharge. The motion was opposed upon the ground of his having been convicted of fraud in the case above referred to. The petitioner's counsel produced a certificate, from the clerk of the constitutional court, setting forth that a new trial had been granted

by that court. It was objected by the actors, that although a new trial had been granted, yet the petitioner had never availed himself of it; and that the mere granting of a new trial, without specifying any reasons, was not sufficient to entitle him to the benefit of the act which he prayed for. The petitioner's counsel then stated that the new trial had been granted, because there had been a deficiency of testimony to convict the petitioner of fraud, in the issue which had been tried before the city court. This statement was admitted by the counsel for the actors to be correct.

Under these circumstances, his honor, the Recorder, ordered the petitioner to be discharged, upon his making the usual assignment.

On the 16th July, 1824, a rule was taken out by the actors against the petitioner, to shew cause, on the 19th of the same month, why the execution, under which he had been arrested, by the actors, and from which he had obtained his discharge, under the prison bounds act, should not be enforced against him, and why he should not be again taken into custody under the same.

This rule was taken out "on the ground, that the discharge, granted by his honor, the recorder, was founded on the representation, that the decision of the constitutional court had reversed the verdict, when in fact, it was apparent from the entry on the docket of that court, that the case was never argued there; and from the circumstance of all the judgments, included in the suggestion, having been paid three months anterior to the meeting of the constitutional court, and no report of his honor, the Recorder, being found among the records of that court, it was equally obvious that no appeal could have been contemplated."

Upon the argument, under this rule, before the Recorder, the counsel for the actors contended: 1st. That the Recorder ought to review the decision he had given; as the representation of the counsel for the petitioner, although unintentionally, had been incorrect; the new trial not having

been granted by the constitutional court, for the reason stated by him.

2nd. That it was manifest the new trial had been granted, by the constitutional court, through the fraud of the petitioner, who prevailed upon his creditors, after satisfying their demands, to consent to a new trial.

3rd. That admitting the new trial to have been regularly and fairly granted, yet the actors not being parties in that case, they were not bound by the decision; and, therefore, might now avail themselves of the objection, that the petitioner, having been convicted of fraud by the verdict of a jury, could not take the benefit of the prison bounds act.

The counsel for the petitioner insisted that the actors had no right to bring this question before the recorder, as he had already decided it on the 11th June, when he discharged the petitioner; and that unless it could be shewn that there had been fraud, misrepresentation or surprise, that decision was conclusive so far as related to this court.

The Recorder determined that if the representation made to him, by the counsel for the petitioner, had been incorrect, so as to effect the merits of the case, he should consider himself at liberty to review what he had decided under such erroneous impressions; but no evidence had been produced to invalidate that statement in any respect; that, it having been admitted to be correct, when the petitioner was first brought up and never having been shewn to be incorrect, he could not but give full credit to it. But had the reasons, for which the new trial had been granted, never been stated to him, he should, nevertheless, have discharged the petitioner. If, therefore, he thought his former decision to have been wrong, which was not his opinion, he could not now interfere with it. After having said this, he said it was not necessary for him to examine the other grounds, as they might all have been urged before him in June last, when the petitioner applied for his discharge. He would nevertheless remark that they seemed to him to be untenable. If the

constitutional court was deceived when they awarded a new trial, it was not for him to reverse their order, but for that tribunal if they thought proper. The circumstance, of the petitioners not again applying for a new trial under the suggestion, was sufficiently accounted for. When the constitutional court awarded a new trial they annulled the former verdict: The parties were then placed in the situation in which they were before the verdict had been given. There was, therefore, no conviction of fraud against the petitioner. He had no longer any object in seeking for a new trial. The creditors had been satisfied. They had consented to the petitioner's discharge, by which they precluded themselves from pursuing their suggestion. As they were no longer creditors, consequently there could have been no plaintiff to the issue, should an attempt have been made again to try the question of fraud before a jury. If the new trial was regularly and fairly granted, the fact, of the actors not having been parties and therefore not being bound by it, was immaterial and the argument founded upon it irrelevant; as they could not deprive the petitioner of the benefit he sought for, unless they either suggested and proved fraud, or shewed that he had been already convicted of fraud. Now, they relied upon no other objection, excepting his former conviction, and that having been set aside when a new trial was granted, there was no conviction in existence when he applied for the benefit of the prison bounds act, in June last.

For these reasons his honor dismissed the rule.

A motion was now made, before the appeal court to reverse this decision on the grounds:

1st. That the discharge, granted by the recorder, was founded on the representation, that a new trial had been granted by the constitutional court, reversing a verdict of fraud against the defendant, when it appeared that the appeal from said conviction was not docketed on the docket of that court, until three months after the debts embraced by the conviction were discharged, and therefore; it could not be considered as a reversal of that verdict.

2d. Because the new trial, ordered by the constitutional court, would not be sufficient to enable the debtor to avail himself of the benefit of it, unless he had made an effort to obtain such trial.

3d. Because on the application, the representation of the defendants counsel operated as a surprise on plaintiff's; and,

4th. Because on the facts set forth and proved his honor should have granted the rule.

Per Curiam.—This court is satisfied with the decision of the recorder, for the reasons he has assigned.

Gibbes and Grimke, for motion.

Elliott and Dunkin, contra.

GORDON & SPRING Assignees vs. Adm'r. of LEEPMAN.

The death of the principal, after the return and filing of the *non inventus* on the *ca. sa.* is no discharge of the surties to a bail bond.

The time allowed the bail, after the return of *non inventus*, to surrender his principal, is *ex gratia*, to avoid his liability, which is fixed from the return.

Tried at Charleston, before Mr. Justice Waties, who made the following report:

"This was an action on a bail bond. The principal died after the return of *non est inventus* on a *ca. sa.* but before the expiration of the term. The plea was, that the bail had a right to the whole term, for making a surrender; and that the death of the principal, within that time, was a good discharge. I was of opinion that the settled practice was otherwise. The case of *Davitt vs. Counsel*. (2 Nott and McCord, 136) was relied on in support of the plea, but it appeared to me that the decision in that case, was not intended to alter the English rule on the point. It refers to the English cases as authorities; and all of these agree that the bail is fixed, *de jure*; by the return and filing of the *ca. sa.* And, although, after this, a further time is allowed the bail

to bring in the principal; yet this is only *ex gratia*, and they take the risk of the death of the principal. (12 *Mod.* 601. 1 *Str.* 511. 2d *Lord Raymond* 1452. 2 *Wils.* 67. 6 *T. R.* 284.) In *Okott vs. Lilly*, (4 *Johnson's R.* 408,) C. J. Kent, in delivering the opinion of the court, says: "There is no case in which the death of the principal after the return and filing of the *ca. sa.* has been allowed as a ground of relief. The time which is allowed the bail is *ex gratia*, and at their peril. I, therefore, overruled the plea, and the plaintiffs took a verdict."

An appeal was now made from the foregoing decision and verdict upon the grounds.

That his honor erred in deciding, that the term, to which the *ca. sa.* against the principal was made returnable, was allowed to the bail *ex gratia* and not *de jure*, and that the bail therefore was not entitled, in this case, to his discharge.

Argued, 21st March, 1825.

Moise, for the motion,—Cited *Davitt vs. Counsel*, (2 *Nott & Mc Cord* 136,) to shew that bail is entitled to the whole term, after the return of the writ, to surrender his principal. The universality of the rule, that bail may have eight days, after the return of the writ, to surrender up the principal, has made it a matter of right (2 *Johns. Rep.* 101.) Bail is not fixed until eight days after the return of the process against them. (2 *Johns. Cases*, 403.) Bail have eight days, after the return of process, in a new action brought by executors of plaintiff. (8 *Tem. Rep.* 422.) The eight days grace was originally *ex gratia*, but is now a matter of right. In England the *ca. sa.* must be filed as well as returned; here it is not necessary to file the *ca. sa.* and bail has the whole term. (1 *Bos. and Pul.* 61. 1 *John. R.* 515.) Death of the principal, after return of the *ca. sa.* and before *sci. fa.* against the bail, discharges the bail. (*Highmore on Bail* 68.)

Holmes, contra.—The extension of the time is *ex gratia*, and not *ex debito justiciæ*; and the death of the principal,

being an injury to the plaintiff, proceeding from the laches of the bail, should not discharge the bail. No case of the death of the principal, after the return of the *ca. sa.* operating the discharge of the bail, (4 *Johns. Rep.* 408.

Grimke, in reply.—Where the principal is taken out of the hand of the bail by operation of law, the bail is discharged. By analogy, where he is taken out by act of God, he should be discharged. By surrender in the period, *ex gratia*, the bail incur no forfeiture but costs. Cases of liberality to bail, (1 *John. Rep.* 413. 1 *Johns. Cases* 28. 4 *East* 189. 18 *John.* 335. A case where the principal was discharged under the insolvent debtors act, after the return of *ca. sa.* is in 5 *Binney* 332.

Norr, J.—The motion is refused. This court concur in opinion with the judge below.

Grimke, Morse and Shand, for appellants.

Holmes and Waring, contra.

JOHN M. LEMON *ads.* JOHN BILLINGS.

On counts, for money had and received, a horse sold and delivered, &c. Plaintiff proved that defendant acknowledged he had received and sold a horse of plaintiffs, but the value of the horse not being proved, the court granted a new trial, the jury having found a verdict for \$50.

Tried at Charleston, before Mr. Justice Richardson.

This action was brought on the following account, viz: June 13th, 1815. To amount of Sanders's note, dated 29th November, given to you for collection as pr. your receipt of this date, \$ 70

One horse returned to you by Sanders, by my } 150
order, as pr. your receipt, and not accounted for, }

The declaration consisted of several counts. Two hundred and twenty dollars had and received, for a horse sold and delivered; for negligently keeping a horse, whereby plaintiff became the loser of its value, and refusing to re-

deliver the same, being requested; and lastly for seventy dollars, for money had, and received on account stated.

Plaintiff produced one witness, Mr. Roach, who proved that defendant had acknowledged that he had received and sold a horse of plaintiff's, but witness having never seen the horse was unable to fix any value. There was no proof of a demand or refusal. The judge stated to the jury, that from the evidence, he was at a loss to see how they could find a verdict for the plaintiff. But if so disposed, they ought not to give more than merely enough to cover costs. They found a verdict notwithstanding for \$50 and costs of suit.

A motion was now made for a new trial, because according to the pleadings, the verdict was contrary both to law and evidence, and was, moreover, unreasonable and excessive.

NORR, J.—This court concur in opinion with the judge who presided in the court below, that there was no evidence to authorize the verdict, which the jury have found, and a new trial is, therefore, granted.

J. B. White, for appellants.

DeLieseline, contra.

SIMON MAIRS, *et. al.* vs. ELIZA SMITH.

The assignees, under an assignment of an insolvent debtor, take the property, subject to all the incumbrances, liens, &c. and in the same manner, to which it was subject in the hands of the assignor.

The property assigned is not to be ratably and proportionably divided among suing creditors, and all other creditors, who come in for a dividend; but creditors maintain their liens, in the same order as against the debtor, before the assignment.

Tried before his honor the Recorder.

This was a rule upon Mr. King, to shew cause why he should not pay over to the Assignees of Eliza Smith, the monies in his possession, arising from property sold in the cases of Adger and Black, and Milliken and Primerose,

against Eliza Smith, in order that these monies be distributed by the Assignees according to law.

On the 3d July, 1823, Eliza Smith filed her petition for the benefit of the insolvent debtor's act, to which, at the same time, her schedule was annexed.

On the 9th October, 1823, some of the creditors of Eliza Smith filed a suggestion of fraud against her, under which she was remanded to jail, but upon an appeal to the constitutional court, she was by them discharged; after which, on the 26th January, 1824, she took the requisite oath.

In January term, 1824, the city sheriff was ordered, upon motion, to pay certain monies in his hands arising from sales under *fi. fa's.* against E. Smith *ads.* Milliken and Primerose, and Adger and Black, *et. al.* to the execution creditors in their order. The sheriff paid these monies to Mr. King the Attorney of Adger and Black, and Milliken and Primerose, but before paying them away, Mr. King received notice from Mr. DeSaussure to retain them, as a motion respecting their appropriation would be made to this court. Mr. DeSaussure contended, that the money in the hands of Mr. King, must be delivered to the assignees of E. Smith, to be by them appropriated:

1st. To the payment of the prisoner's jail fees, of the costs of suit under which she swore out, and of the costs for obtaining her discharge.

2nd. To the payment of her debts in the legal order, judgments of the same date, being put upon the same footing.

Mr. Pepoon who appeared for creditors, who had not obtained judgments, but who were willing to come in and take a dividend of the insolvent's effects, contended that the assignees were bound to pay the insolvent's debts in average and proportion, according to their amounts, without regard to their nature, with the exception of specific liens and the preferences pointed out in the act,

Mr. King contended, as the monies under the executions of Adger and Black, and Milliken and Primerose, were made by the sheriff, and paid over by him, before *E. Smith* swore out, that his clients were entitled to retain them exclusively; the assignees having no right to receive them under their assignment.

The Recorder delivered the following opinion.

It was agreed upon among the parties, that the money in *Mr. King's* hands, should be regarded as if it were in the possession of the city sheriff; and it is also agreed that in deciding the motion which has been made, I shall determine the order and mode in which insolvents effects shall be distributed by the assignees. All the questions which have been made, will be disposed of by ascertaining:

1st. The rights of the assignees under the insolvents assignment?

2nd. The order and mode in which the debts due by the insolvent are to be paid by the assignees?

1st. The question under this head, is whether the assignees are entitled to all the property of the insolvent, which she owned at the time she petitioned for the benefit of the act and filed her schedule, or whether they are only entitled to what was in her possession, at the time when she swore out?

In the 1st clause of the act, it is enacted, that if any person shall be sued, &c. and shall be minded to make a surrender of all his effects towards satisfaction of the debts wherewith he stands charged; or in which he shall be indebted to any person, he shall within a certain time after being taken into custody, exhibit his petition with an account of his real and personal estate, and upon such petition the court is required to order the petitioner, and the creditors at whose suit he stands charged, and all other his creditors to be brought before them at an appointed day; when unless successful opposition be made to the prisoner, an oath shall be administered to him that the account, or schedule, filed

with his petition, contains a true account of all his real and personal estate, debts, credits and so forth, which he possessed or was entitled to, when he swears off, or which he possessed or was entitled to, at the time when he filed his petition. After taking this oath, the debtor executed an assignment of the lands, goods, and effects contained in his schedule to assignees appointed by the court, by which assignment the lands, goods and effects, "so assigned," are vested in the assignees, who may take possession or sue for them in their own names. Upon executing this assignment, the prisoner is discharged, with a proviso, within six months afterwards, he deliver to the assignees all such effects contained in the schedule, as shall be in his power to deliver. In the 17th clause, it is enacted that if any insolvent debtor, at the time when he shall render an account of his estate, pursuant to the directions of the act, (*i. e.* of his estate at the time when he filed his petition and schedule,) shall conceal any debts owing to him, the assignees may recover such debts. By the 18th clause, if any person shall discover any property of the insolvent, "subsisting at the time of his swearing off," not comprised in the schedule, he shall be allowed 50 per cent, of its nett produce, when sold by the assignees.

None of these passages of the act can bear any other sense than that the debtor is compellable to assign all the property he had when he petitioned, and that this is one of the conditions upon which he is discharged. All such property, therefore, becomes vested in the assignees, and consequently no part of it can be levied on or sold by any creditors subsequently to the time when the debtor filed his petition. It may be urged that this interpretation interferes with the common law rights of the creditor; and if the meaning of the statute were doubtful, this argument might be forcibly insisted upon; but where the meaning is plain, the common law must be regarded as repealed by necessary implication.

2nd. In the first section it is said, that the assignment "shall be in trust for the suitor or suitors," at whose suit the debtor stands charged, and such other of the creditors as shall be willing to receive a dividend; provided, they make their demands within twelve months, that the petitioner shall be forthwith discharged from the suit under which he was imprisoned, and "from and against all such others of his creditors, as shall have received their dividends, as aforesaid, for all debts, contracts and demands whatsoever." In the 3rd. section, the assignees are required, first to discharge the said costs of suit and other costs and fees aforesaid, meaning the fees of the keeper of the jail, the costs of the suit or suits prosecuted against the debtor, under which he was imprisoned, and the costs incurred upon prosecuting and obtaining his discharge. (see the 1st section.) Andly. To retain a compensation for executing the assignment; 3rdly, To divide the balance amongst such of the creditors who deliver in their demands within the time aforesaid, according, and in proportion to their respective debts. In the 4th, 5th, 6th and 7th sections, certain liens are preserved upon certain conditions.

But to decide this case, it is not necessary to advert to any of these sections, several passages of which are very ambiguously, if not unintelligibly, expressed. By the act it is declared that the creditor or creditors by whom the debtor has been imprisoned, can have no further remedy against him. And by our courts it has been solemnly decided that the same rule prevails as to all creditors, who have brought suits, whether they have obtained judgments or not. All the creditors, therefore, who have brought suits against the debtor are forever debarred from any other redress against him, than that which is afforded to them out of the assigned estate. This being the law, it would be paradoxical to compel creditors to come in and take a dividend, if the amount in the hands of the assignees is not to be divided, but to be so appropriated that prior incumbrances may take the whole. The words of the act are general. The assignees

are trustees, not only for the suing creditors, but for all the creditors who are willing to come in and receive their dividends. The only preferences given are to certain specific liens and certain costs and fees; and if it had been intended to give other preferences, it is to be presumed that they would have been mentioned. If certain preferences are preserved, the rational inference is, that no others were intended to be preserved. In the prison bonds act, it is declared that the property assigned shall be subject to all prior incumbrances; if the same had been the object of the insolvent debtors law, would it not also have been expressed? A statute ought to be so construed that no man who is innocent be endamaged. (3 Inst. 360.) Now if older judgments are to be paid before junior judgments, the legal remedies of the latter would be impaired, by their being compelled to resort to an exhausted estate. And this consequence would attach to them, though they had been guilty of no fault; having done no more than pursue that course, for the recovery of their debts, which the law directed and sanctioned; and they would be subjected to this injurious necessity merely because they had brought actions. For those who had not sued, might refuse to resort to the insolvent estate and might prosecute their rights against him at a future day. Where creditors suffer the same disabilities they ought to reap the same advantages. The maxim, *qui sentit commodum sentire debet et onus*, is as equitable and legal a principle when stated in the converse, *qui sentit onus, sentire debet et commodum*. By the bankrupt laws, the bankrupt is discharged from all debts due or owing at the time of the bankruptcy; and all debts (with certain exceptions which do not affect this question,) without any regard to their nature, come in equally for a dividend of the bankrupt's assets. The reason is the same under the insolvent debtors law, so far as it relates to creditors compelled to discharge the debtor. The rule ought, therefore, to be the same. And this reasoning is considerably strengthened, not only by the expressions in the law which I have already re-

sorted to, but by the precise coincidence between its expressions in the 3rd clause, "according and in proportion to their several and respective debts," and those in the 33d section of the bankrupt act, of the 5th Geo. II. c. 30. of force when our insolvent debtors act was passed, and from which, it is probable, the words in our act were transcribed.

Upon the whole, collecting the meaning of the insolvent debtors act, as well from its expressions, as from its apparent object and intent, I am of opinion that all creditors (with the exception before mentioned) who are deprived of any future remedies against the debtor, are to be placed upon an equal footing; and as it has been decided, that all judgment creditors are compelled to release their demands against their debtor, they are all to take the same dividend of his assets, without any regard to the order of their dates.

Having arrived at the foregoing conclusions upon the questions which have been presented, it is ordered that the monies in Mr. Kings' possession be by him delivered to the assignees of Eliza Smith, to be by them distributed in the following manner:

1st. To the payment of the gaolers fees and of the costs of the suits in the cases of Simon Mairs *et* H. A. DeSaussure, and of the costs incurred in prosecuting and obtaining the debtors discharge;

2nd. That they retain the usual compensation for their trouble in executing the assignment; and

3rd. That they divide the balance, thereafter remaining, rateably and proportionably, among the suing creditors and all the other creditors, who, pursuant to the directions of the act, shall come in and declare their willingness to accept a dividend "

From this decision, an appeal was carried up and argued the 24th and 25th February, 1825.

King, for the motion—Contended that under the law of this state, no such construction had been given, as that taken by the Recorder. Any creditor might loose his lien.

The Recorder was mistaken in being governed by the bankrupt law, instead of the English insolvent debtor's law. Our act, refers to the insolvent law, (*Pub. Laws*, 247.) passed 1729; and no such construction has ever been given to it in England. The common law rule of construction is the best. That is, cotemporaneous exposition. Here the exposition has been 40 or 50 years, as he contended for it. And if the rule was otherwise, then executions lodged, for the purposes of obtaining priority over junior executions, would loose their liens, and they would all come in *pari passu*. Suppose the case of a judgment and subsequent mortgage. The statute does not take away the lien of mortgages; and by that means a mortgage may obtain a preference over a prior judgment. (*Brown vs. Gilleland*, 3 *Eq. Rep.* 539. 1 *Bay*, 298.) The practice of a country should have weight in giving construction to acts. (1 *Pr. Williams*, 223. 2 *Str.* 755. *Burr.* 1755.) Besides, the assignment is voluntary, and should not be allowed to divest prior liens.

Choses in action, besides land and property out of the state, are not bound by judgments, &c. They may be so distributed. They may satisfy the language of the law. The prison bounds act and this, may be construed, in some respects *pari materia*. In that act all liens are retained. Judgment and other creditors, who do not choose to take dividends are not barred. (*Sturges vs. Crowninshield*, 4 *Wheat.* 122. *Stapleton vs. Mooreham*, 6 *T. R.* 366. *Tidd*, 978.)

Pepoon, contra—cited *Bingham on Judgments*, 256, *Cullen on Bank.* 270. 157. 229. The design of the law was to put the whole property into one fund, to pay the creditors, as far as it will go, and to discharge the debtor. (*Cooper's Bank. Law.* 235. 209. so 22. 63 89. 99. 103. *Cullen*, 209.) By the act, the assignees are allowed to sue, &c. as bankrupt assignees in England. (*Public Laws*, 75.) *Lex nimis facit injuriam*. If the act of the law discharges the debtor, his judgment is put into the same situation. (*Bingham*, 266.)

The oldest execution has preference on account of diligence. The party who has taken a *ca sa*. seems still more diligent. It is a question whether the title of the assignees vests by the assignment or by operation of law from the time of the petition. Our act, giving the power given to assignees of bankruptcy, makes the bankrupt law, so far, in force. By the 7th section, unless judgment creditors come in, and show their judgments *bona fide*, money paid on them, vested in the assignees. By the 17th section, no debt paid to the insolvent, nor his release, after his account filed, is a bar to suit of the assignee. As after an act of bankruptcy in England, the petition is notice to all the world. (*Cullen* 229.) After act of bankruptcy he has no power over his effects. So far then, our act adopted the bankrupt law of England. Upon assignment made, the assignees may take possession, &c. and sue, &c. as the assignees of bankrupts. The 17 sec. shews they may sue by relation back, for debts paid before. If he do not render in all his property, he is not entitled to the benefit of the act. Why must the schedule be rendered at the time of petition, if it be not affected by it? If afterwards property is discovered, half goes to the assignees; which must be by relation to the petition and not to the assignment. (*Cooper* 82) This is in some respects a bankrupt law. As far as made obligatory to creditors to come in and take a dividend, it is a bankrupt law. If filing petition and schedule is to have any effect, it must be to divest debtors power over the property.

If they have a lien and prior right, they must take through the hands of the assignees. Lien is not a right of property. The act requires parties to prove their judgment and mortgages. These have not proved their judgments, and have lost their lien. It is a question in what manner shall debts be paid? When this act was passed bankrupt laws were in force. It was the received notion that judgment creditors had no priority. It was reasonable and just that all insolvent's property should be divided amongst all his creditors. The

assignees are made trustees for all creditors who shall come in, &c. and first they are to pay costs and retain compensation, and divide according to the amount of debts. Similar to the words made use of in the bankrupt laws. The act of Congress so provides. (*Cook* 99.) The act of 2nd George divided according to amount of debts. All the property shall make a common fund.

The act does specify what liens shall be preserved. Mortgage was then a transfer of property with the right of possession, but is since made a mere security. Even pledges, before act of George 3rd, were transferred to assignees.— Those who only give credit on the security of the property preserved their liens. Those who give personal credit are not entitled to any preference. As to lien on subsequently acquired property, in *Mayrant vs. Myers*, 2 *Const. R.* 419. this court has decided that all judgment creditors are forever barred, and their liens are not only divested but their debts satisfied.

The suing creditor, is, in terms, made the object of the trust. It makes him pay the costs of suit, and the assignees repay him. Yet shall other judgments take all, and he who is most diligent mulct? What becomes of the doctrine of lien, as to property discovered, and as to the amount necessary to pay costs? If the construction contended for be correct, simple contract creditors are in a better situation, than judgment creditors. They are not bound to take dividend, nor are they bound afterwards. The object of the act, is to prevent fraudulent judgments covering the property. They must come in and swear they were obtained *bona fide*. (*Porteus, vs. Sullivan*, 1 *M' C.* 397.) Here the judgment loses its solemnity, and is proved by the oath of the party and not by the record. If the party within three months, before application, prefers one creditor, (though on judgment) he is not entitled to the benefit of the act. Shall the law give the preference, which it forbids the debtor to give? By the 19th section of the act, trustees are allowed to give the debtor 5 per cent. of his property; which is similar to the statute of

George 2nd. If the prior judgment take all, he must be deprived of this. It would be well for the community if these liens were put an end to.

King, in reply—By the common law the arrest of defendant on *ca. sa.* is an entire discharge of the debt.

The act has so far altered the common law, in this respect, that if defendant is discharged under the insolvent laws, the plaintiff is entitled to come in *pari passu*, with other creditors, but his lien on the property in virtue of his judgment and *fi. fa.* is entirely gone; as to this purpose, the judgment is satisfied. (4 *Dall.* 214. *Ib.* 277.)

NORR J.—The first question in this case is, whether judgment and execution creditors shall retain the liens which they have acquired, on the property of an insolvent debtor, at the time he applies for the benefit of the act, or whether they are divested by such application, and are required to come in on a footing with other creditors and receive a dividend in proportion to their respective demands?

If this were a new question, perhaps it might have been entitled to the consideration which has been bestowed upon it: But the act has been in operation for upwards of sixty years; and, as far as we have been able to obtain information respecting the construction, which has hitherto been given to it, we are induced to believe that it has been favorable to the lien creditors: And a uniform practice for such a length of time ought to be conclusive of the question. It furnishes the highest evidence that we can now have of the early decisions of our courts upon the subject, and is entitled to all the respect which would be due to the most solemn decision of this court; and I do not know but we should have fulfilled our duty as well by resting the case upon that ground alone, as by attempting now to justify that construction of the act.

I am, nevertheless, of opinion that it can very well be maintained.

It must be admitted, that if the insolvent debtors' act had never been passed, a debtor could not by assigning his

property have defeated any prior liens; and it is not perceived that the act contains any provision, by which the relative situation of debtor and creditor is at all changed, in that respect. The act has prescribed no method by which a creditor can compel his debtor to surrender his property for the payment of his debts; neither does it enjoin it upon the debtor as a duty to do so. The assignment is a voluntary act of the party and not an act of the law; and he cannot by his own act relieve his property from pre-existing liens. Arresting the body on a *ca. sa.* is equally voluntary on the part of the creditor; it is not a process allowed by the act for the purpose of effecting a surrender of the property; neither is a surrender the necessary result. A creditor would have been entitled to a *ca. sa.* if the act had never been passed, and the debtor might have assigned his estate for the payment of his debts. But such an assignment could not have affected the rights of others, neither is there any thing in the act to give it that effect now. The object of the law is to relieve the debtor from perpetual imprisonment. It, therefore, provides that when he shall have surrendered all he has to his creditors, he shall be discharged, as well from his debts as from imprisonment: But it does not deprive the creditors of any security which they had before obtained.

It is contended that by the act, the debtor is required to assign *all* his property, and that the property so assigned, shall be vested in the assignees, for the benefit of *all* the creditors; from whence the conclusion is drawn, that as *all* his property becomes vested in the assignees, there can be none upon which the judgments and executions can operate.

But I must here again repeat that the act does not require him to assign his property. It only provides, that if he choose to do so, he shall assign the whole and not a part. The assignees can acquire no better right than the assignor possessed himself. The rights of the debtor are transferred to the assignees, and nothing more.

It is also further contended, that the act declares that

the assignees "may take possession of the property, so assigned, or sue for the same in their own names, in the same manner as commissioners of bankruptcy can or lawfully may do by the laws or statutes of Great Britain," it was intended to adopt all the provisions of those statutes. The same inference is also drawn from the fact, that some of the clauses of our act, appear to have been copied from the British bankrupt laws.

But introducing a specific provision from those statutes will not authorize the conclusion that the statutes themselves were intended to be made of force. Neither can we infer, from the adoption of a single clause, an intention to give operation here to the whole system of British bankrupt laws. It would rather lead to a contrary conclusion, upon the well known legal maxim, that the express adoption of a specific provision of an act amounts to a virtual exclusion of all the rest,—*expressio unius, exclusio alterius*. The reference of the act, to the bankrupt laws of Great Britain, relates specifically to the power of the assignees to take the property or to maintain actions for the recovery of the same, and to that only. This construction also best comports with the good faith of the legislature. A creditor when he has obtained a judgment, is aware of the hold he has upon the property of his debtor. He rests confidently upon the security he has acquired; and we ought not to indulge the belief that the legislature intended to destroy the security which the law thus afforded to judgment creditors, in favour of subsequent creditors, without the most unequivocal expression of such intention. But no expression is found in the act: The fair deduction, therefore, is, that all pre-existing rights and obligations remain unimpaired. The assignees are substituted in the place of the debtor with all his rights and privileges, and take the property subject to all the incumbrances, liens, defect of title, &c. to which it was subject in his hands. Any person may assign his property, notwithstanding judgments, executions and mortgages may be hanging over it. But

the assignee must take it subject to those claims. He may redeem it from the incumbrances, and his title is good. It cannot be effected by intervening judgments. Such is the extent of the right which the assignees, in this case, have acquired. The decision of the Recorder on this point, is, therefore, reversed.

Another question has been raised in the course of the argument. That is, whether the party who has taken the body of the defendant on a *ca. sa.* has thereby lost the lien which he before had on the property?

Before the statute 21st. *James*, I. c. 24. taking the body in execution was considered as a satisfaction of the debt. If, therefore, the defendant died in gaol, the debt was lost. By that statute, it was provided that the plaintiff might still have a *fi. fa.* against the goods of his deceased debtor. The statute itself, however, preserves the rights acquired by intermediate transfers. And, if it had contained no such provision, it is not improbable that such would have been its construction. So where a person is discharged by privilege of parliament, a statute was necessary to subject his goods to the operation of an execution afterwards, (2 *Bacon*, p. 718. title *Execution*,) viz: 1st *James*, I. c. 13. If the defendant in this case had not taken the benefit of the act, the plaintiff certainly would have lost his lien on her property. He did not resort to the *ca. sa.* for the purpose of compelling her to surrender her estate; but to coerce the payment of his money. He voluntarily let go the hold that he had upon her property for what he considered better security. He made his election, and could not by any act of his own, divest the liens which others acquired in the mean time. The act makes no such provision. It preserves the debt but not the lien. A contrary construction would be attended with the most mischievous consequences. It would be setting a snare, in which the most honest, *bona fide*, purchasers might be caught, to give to a judgment such a retrospective operation. The court, therefore, are of opinion that the lien which the plain-

tiff lost by taking the body of the defendant was not restored by her discharge from imprisonment. The judgments and executions must first be paid in their regular order out of the proceeds of the property, on which they had a lien, previous to the assignment. If the defendant had any funds on which the lien creditors have no hold, or if there are any after those are satisfied, they must be distributed among the creditors according to the provisions of the act.

Messrs. *King, Frost, Ford and DeSaussure*, for Appellants.

Mr. *Pepoon*, for Appellee.

A. S. RHODES vs. LYDIA BUNCH, et. al.

In an action of trespass *quare clausum fregit*, the plaintiff must recover either upon his possession or his title.

Facts and circumstances, may be given in evidence, by way of mitigation, which were the inducements to a transaction; even though they may happen to involve character.

So in trespass *clausum fregit*, in mitigation, defendant may prove the land to be his, and that the plaintiff had obtruded himself into the possession of his land; that he was a vagabond, and that he had obtruded himself into the place for the purpose of preying upon the neighborhood, and trading with their slaves.

This was an action of trespass *vi et armis*, tried at Charleston, before Mr. Justice Huger. It appeared that the plaintiff got possession of a small house in the neighborhood of the defendants, near Monk's Corner; that the defendants were disposed to get rid of him, believing that he was dealing with their negroes and was a troublesome neighbor. To effect this, they issued a distress warrant, whilst the plaintiff was from home, and seized upon such articles as were in the house, which were very few and of little value, being such as were suitable only for the lowest retail grog shop, worth about \$5 or \$10. The defendants thought they had a right to issue this warrant, as they were the owners of the place.

On plaintiffs return home, he found the defendants in possession of the house. He applied for a writ of replevin but before it was served, he received back from the defendants all his goods, in as perfect a state as he left them. He had been out of possession only four days. On this replevin suit, the jury found a verdict for the defendants. And this action was now for the trespass. The facts were proved as stated above. Besides evidence was given, that the house was pulled down by the defendants, whose property it was. The house was of no great value. The plaintiff paid tax for no property whatever. He had gone into this house about 18 months before this. The tax for the premises were paid by defendants. The plaintiff had been committed to jail in Charleston for having been engaged in the insurrection there, a year or two before that. The house was pulled down at the request of the defendant, by defendant and the neighbors, who had been invited there for the purpose. The plaintiff was not present at the time. He had moved off his articles, about 200 yards. Defendant had taken the possession, and destrained some time previous to this. When the house was pulled down, nothing was in it. Defendant had taken quiet possession of it before. The object in pulling down the house was to prevent plaintiff, Rhodes, getting possession again, and to expel him thereby from the neighborhood; as he was trading illicitly with the negroes. The plaintiff was regarded as a nuisance in the parish, and a great vagabond, with whom no white man associated, and who cultivated no land, and owned no other property, than as stated above, which were only fit for negro trading. When plaintiff received back his goods, he made no complaint, and did not pretend to claim property in the land.

The plaintiff, on the other hand, made some pretended claim to the land; he had been put into possession by one Burney, who had had possession of the land in 1813, as trustee for his child, and who built the house and lived in it for eighteen months. It was not proved when plaintiff was put

into possession. Plaintiff's own witnesses proved that the land was reputed to be defendant's; and that the plaintiff had been an inmate of the Charleston gaol for seven or eight years, the greater part of the time for perjury.

Mr. *White*, for the plaintiff, objected to this evidence, but was overruled.

His honor, Judge *Huger*, told the jury, that he was disposed to think that the plaintiff had been in possession, and had been illegally turned out, and that he was entitled to a verdict; but, that he was not entitled, in his opinion, to more than a cent; and of that they were to judge. He also observed, that if he had been in the situation of the defendants, he should have done as they had done, and trusted, as the defendants were then doing, to the good sense of a jury of his country to assess the damages.

The jury found a verdict for the plaintiff for *one cent*.

The grounds for a new trial were:

1st. Because the presiding judge permitted the plaintiff's bad character to be given in evidence, to mitigate the damages.

2nd. Because the judge erred in his instructions to the jury, with regard to the amount of damages which they ought to give.

J. B. White, for motion.—In an action of trespass for pulling down a house, the character of the plaintiff cannot be given in evidence. The devil himself has rights; and the law will give him his due.

Hunt, contra.—The question of the possession of the plaintiff was doubtful. The land belonged to the defendants. It was altogether a question for the jury. Character incidentally proved in shewing the plaintiff's occupation, as a measure of damages, which was correct.

Clarke, in reply.—Where improper evidence is allowed, the court will grant a new trial. They cannot say what effect it produced with the jury. The evidence of character, in this case therefore was improper. (*Phall. Ex.* 145.) The rightful possession was proved in the plaintiff; which is sufficient to maintain the action.

NOTT, J.—Before I go into a consideration of the grounds taken in the brief, I would observe, that this is an action of trespass, *quare clausum fregit*, in which the plaintiff must recover either upon his possession or his title. He has not even stated a possession in his declaration, nor given any evidence of title. On the contrary, it was proved that he had actually left the place, and that the defendant was in peaceable possession, before the alleged trespass was committed. That came out from the plaintiff's own witness on his direct examination. The plaintiff did not pretend to set up any title. On the contrary, the defendant shewed a good title in himself. It might perhaps have been irregular, according to the practice of our courts, to allow the defendants to give evidence of title under the general issue, but it was offered without objection and is now before us, and we see that the plaintiff had no right. The verdict ought therefore to have been for the defendant; and if the plaintiff was not entitled to a verdict on his own evidence, he cannot entitle himself to a new trial, on the ground that the damages are inadequate, even though illegal evidence was offered in mitigation.

But let us now examine the testimony and see if the objection is well founded?

It certainly was a case in which character ought not to have been allowed to be given in evidence. But it is often permitted to give facts and circumstances in evidence by way of mitigation, which were the inducements to a transaction, even though they may happen to involve character. Thus in an action of assault and battery, though the defendant cannot give in evidence the bad character of the plaintiff, by way of excuse, he may prove that he has traduced his character, had insulted his wife or daughter, or that he had found him within his enclosure, attempting to steal his goods or to excite his negroes to insurrection; or any other fact to shew the motive which induced the act. So in this case the evidence went to show that the title and possession of the land

were in the defendant; that the plaintiff was a perfect vagabond, having no fixed place of residence; that he had obtruded himself into the possession of this place, not for the purpose of cultivating the soil, but for the sole purpose of preying upon the neighborhood, trading with their negroes and engaging in every kind of licentiousness. Indeed, he was considered so great a nuisance, that it became necessary for the preservation of the peace and protection of the morals of the neighborhood that he should be banished from their society. The defendant, therefore, with ~~consent~~ of the rest of his neighbors, availed himself of an opportunity, when the plaintiff had left his retreat, to enter and demolish the house, to prevent him from returning to it again.

And what injury has he sustained?

His person has not been violated, nor his property invaded. The defendant has pulled down his own house, rather than the neighbourhood should be infested with such a nuisance.

The testimony, therefore, was such as was well calculated to give the jury a correct view of the transaction and to enable them to form a just estimate of the merits of the case; and if it happened to involve the character of the plaintiff, it was his own fault and not the fault of the court or of the law.

With regard to the instructions of the court to the jury, I do not know what judge could have refrained from expressing himself to the same effect. It was nothing more than expressing his approbation of the virtuous indignation, manifested by an injured community, against the disturber of their peace and the corrupter of their morals. And although men are not to be encouraged in taking the law into their own hands, either to obtain satisfaction for a private injury, or to redress a public wrong, yet the law will excuse when it cannot justify, and mitigate when it cannot excuse, if the transaction has proceeded from a proper motive, and the injury to the party complaining is not greater than he deserved.

In the present case, I do not perceive that the plaintiff has sustained any real injury; and there was nothing in the transaction which entitled him to vindictive damages. I think, therefore, that he has received the full measure of the damages to which he was entitled.

The motion must be refused.

Clarke and White, for the motion.

Hunt, contra.

R. W. KNIGHT vs. C. PACKARD.

In an action by the indorsee against the drawer, the indorser is a competent witness to prove usury.

The doctrine, in *Walton vs. Shelly*, "That a person is not a competent witness to impeach a security which he has given, though he is not interested in the event of the suit," is not the rule in this state; but on the contrary that of *Jerdaine vs. Lashbrooke*, is the law of this state.

The case of *Cantley vs. Sumter*, (2 Bay 93,) said by the court to be incorrectly reported; as the witness, offered there, was the *plaintiff* in the cause, upon which ground he must have been rejected. (a)

This was an action of *assumpsit* on a promissory note by the indorsee against the drawer.

Tried before the recorder of the city of Charleston, in October term, 1823.

(a) Since putting this case to press, the editor, has found in his possession, a M. S. Report, of the case of *Cantley vs. Sumter*, by the late Judge Brevard, who was kind enough, previous to his death, to send the editor his M. S. S. It seems his report fully confirms the opinion of the court, as to the true ground upon which that case was decided.

"In the Constitutional Court, at Columbia, Dec. 1791.

CANTLEY vs. SUMTER.

Motion for a new trial. The action was debt on a bond, tried in Camden district, sued in the name of the original obligee, who had assigned over the bond before the commencement of this action to one Smith, who had also assigned it over to another person, the real plaintiff. At the trial, the defendant's counsel offered the *nominal plaintiff* as a witness to prove payment of part of the debt to himself, which was refused on this ground. The application was made for a new trial; but the court refused to grant it." R.

The pleas were *non assumpsit* and usury.

The defendants counsel offered Welcome Olds, the indorser of the note, as a witness to prove the usury. The plaintiffs counsel objected to his being sworn, upon the ground that a party to the note was an incompetent witness. Authorities were produced, both in favor of, and against the position of plaintiffs counsel. The court overruled the objection, and said that it appeared to the court, upon principle, that the indorser was a competent witness.

Mr. Olds, then, deposed that the note originally was given by himself and the defendant to the plaintiff for \$500, at 30 days; that for his forbearance of 30 days, five dollars were paid as a premium; that these five dollars were paid one, two, three, or four days after the note was drawn. That \$100 were paid upon this note, and a new one given for the balance of \$400 at 30 days. That upon this note four dollars were paid, as a premium for the loan, and that these four dollars were paid, either on the day when the note was drawn, or a day or two afterwards, which the witness did not recollect. Upon being crossexamined, the witness said that the plaintiff had loaned him money at several times, as often as two or three times, but that these sums had been returned; and did not constitute any of the payments made upon this note; that for the last mentioned note, of \$400, another note for the same amount had been given at seven days, which was the note now in suit.

The Recorder stated to the jury the legal definition of usury and left the case to them upon the testimony.

The jury, after having been out some time, enquired of the court whether the second premium, of four dollars, had been paid on the day when the note for \$400 was drawn or afterwards. The court informed them that the words of the witness, were, that these four dollars were paid, either on the day when the note was drawn, or a day or two afterwards, but which, the witness did not recollect. They found a verdict for the plaintiff.

A motion was made for a new trial, on the ground, that the drawer of the note was an incompetent witness to prove usury.

NOTT J.—The court concur in opinion with the recorder in this case. The cases in which the question has been discussed, are so familiar to the profession, that it cannot now be necessary to go into a very nice analysis of them. The whole doctrine will be found in the three cases of *Walton vs. Shelly*, (1st. *Dunford & E.* 296.) *Bent vs. Baker*, (3 *D. & East.* 27.) and *Jordaine vs. Lashbrooke*, (6th *D. & E.* 601.) In the first it is laid down that “no party who has signed a paper or deed, shall ever be permitted to give testimony to invalidate that instrument which he has so signed.” It is necessary here to attend to the words of the learned judge who presided in the kings bench, when this opinion was delivered: He shall not be permitted to invalidate any “paper or deed.” But in the case of *Bent & Baker*, which occurred about two years afterwards, the same judges, with the exception of Lord Mansfield, who had left the bench in the mean time, apparently dissatisfied with that decision, endeavored to modify the rule by restricting it to *negotiable* instruments. That was not a case, however, arising on a negotiable instrument, and cannot, therefore be considered as deciding any thing, but, that the law was incorrectly laid down in the case of *Walton & Shelly*; and reserved the question as to the correctness of the rule, in relation to negotiable paper. The law remained in that unsettled state until the case of *Jordaine & Lashbrooke*, when the court declared, after great consideration, that the whole doctrine was founded on mistaken principles, and that the objection ought to go to the *credibility* of the witness and not to his *competency*; and Lord *Kenyon*, in that case denies, that he even made use of the expression imputed to him in the case of *Bent & Baker*, recognizing the rule as applicable even to negotiable instruments; and although there may be found some conflicting decisions among the *nisi prius* cases since that time, the courts have all ultimately adopted the

principle of the case of *Jordaine & Lashbrooke*, and the question is now as well settled in England, as any that has ever been discussed in their courts. A diversity of opinion has been entertained in the American courts on the subject. The rule as laid down in the case of *Walton & Shelly*, has been adopted by some of them. In others, it has undergone various modifications. I think the rule, most generally adopted, is, that a party may be permitted to give testimony to impeach his own deed or paper, not negotiable; and to give evidence, even in an action on a negotiable instrument, to any fact which occurred after its creation, which may go to its destruction, but not to impeach it, as it is expressed, in its *original concoction*. Let us then examine the grounds of these distinctions, and if it shall be found that no such distinction is authorized by the general rules of evidence, I think the conclusion will follow that the rule itself cannot be supported. The civil law maxim, quoted by Lord *Mansfield*, in the case of *Walton and Shelly*, *nemo allegans suam turpitudinem est audiendus*, seems to be the best text from which the whole doctrine is derived. Now, if the ground of incompetence be, that a party to a fraud shall not be permitted to publish his own shame, then it must apply as well to deeds and all other papers as to negotiable instruments. He must be as incompetent in one case as the other. His competency cannot depend upon the nature of the case in which he is called to testify. It is as dishonest to give currency to a bond which is founded on a base consideration, as to a negotiable note; and the party who is called upon to prove the fact is equally the herald of his own shame in both. It is as fraudulent to put into circulation a negotiable note, after it has become due and been paid off as one which was void in its original creation. The rule, therefore, must be admitted to the whole extent to which it was laid down in the case of *Walton & Shelly*, or it must be exploded altogether; and it is admitted by all the modern adjudications to be applicable only to cases arising on negotiable instruments. If it be founded on pub-

lic policy, then it is no longer a rule of evidence, but goes to the nature of the defence; and the testimony ought not to be admitted, even though the fact could be established by a witness who was no party to the transaction. If, therefore, we intend to have our decisions governed by any fixed rules of evidence, we must suffer the objection to go to the credibility only, and not the competency. And, indeed, upon examining our decisions, it will be found that such has been the rule by which the courts of this state have always been governed. The case of *Cantey & Sumter* (2nd Bay 93.) would appear at first view to lead to a different conclusion. But upon examination, it will be seen that the question could not have arisen in that case. Cantey was the plaintiff in the action, and therefore, could not have been a witness for any purpose: And although in the course of the argument it was urged that he could not be a witness to impeach his own deed, it does not appear that that was the ground of his rejection; neither could it be, since his being a party on the record was an irresistible objection to his admission. The argument of the counsel has been received as furnishing the ground of decision and the case has been pressed upon us as deciding a principle which it does not embrace. Besides, that was an action on a bond to which the rule does not apply. Again, he was not called to invalidate the instrument itself, but to prove payment afterwards, which all the advocates of the rule now admit is allowable, even in actions on negotiable instruments. I take it, therefore, that the decision went on the broad ground, that as he was the plaintiff in the action he could not be a witness; without deciding any other point: And I am the more disposed to come to that conclusion, because I find in the same volume, p. 23. that in the case of *Payne, Indorsee, vs. Trezevant*, the indorser of a note was admitted to prove that it was given on an usurious consideration. In the case of *Smith vs. M'Dow*, (1 Constitutional Reports, 277,) and *Haig vs. Newton*, (1 Const. Reports, 423,) the question was fully argued. In the first, the question

was, whether the indorser of a note might be permitted to prove, that it was indorsed after it fell due, in order to let in the drawer to a defence which would go to defeat the action. The court held, that the witness ought to have been admitted. In the latter the drawer was rejected, not on the ground that he might not be permitted to invalidate his own note, but on the ground of a supposed interest which he had in the event of the cause. In the case of *Motte & Dorrell*, (1 *M' Cord's Reports*, 350,) which was an action against the indorser, the drawer was admitted by Judge Bay, as a good common law witness to shew that the note and the endorsement were both usurious; and the decision was supported by a large majority of the constitutional court. The same question also was decided in the cases of *Thomas vs. Brown*, (1 *M' Cord*, 557,) *Flemming and Mulligan*, (2 *M' Cord*, 173,) *Brummer et ux, ads. Wilks*, (Do. 176.) In the case of *Snellgrove vs. Martin & Patrick*, (2 *M' Cord*, 241,) it was held that even the declarations of the payee of a note, made before it had been negotiated, might be given in evidence to defeat an action brought by the indorser against the drawer. Judge *Colcock* dissented, only because the payee was a competent witness and ought to have been sworn. (b.) If, therefore we intend to be consistent with ourselves, we are bound to support the decision of the recorder. It may be further observed, that previous to the case of *Jordaine and Lashbrooke*, the rules of evidence were very unsettled in England. The line of distinction between competency and credibility had not by any means been distinctly drawn. Lord *Mansfield* observed, in the case of *Walton vs Shelly*, that the old cases upon the competency of witnesses had gone upon very subtle grounds. Judge *Buller* in the same case observes, "as to the question of interest, it is much to be lamented that there

(.) In *Martin vs. Lightner*, (2 *M' Cord's Reports*, 214,) the declarations of the payee were rejected, in a suit by a bearer against the drawer, on a note made payable to the payee or bearer, on the ground that he might have been made a witness.

is such confusion in the cases." In the case of *Bent & Baker*, Judge *Ashurst* says "there is such a contradiction in the decisions respecting the boundaries of evidence, that I choose rather to give my opinion on the particular circumstances of the case, than to lay down any general rule on the subject." Judge *Buller*, in the same case, again remarks, "there is no question more perplexed, than what objection shall go to the competency and what to the credibility of the witness." And it was not until the case of *Jordaine and Lashbrooke*, that the law became finally settled; and I am glad to find that the experience of thirty years has taught the judges of England and this state, to think alike on so important a question of evidence.

We ought not to consider the cases of *Walton and Shelly*, and *Bent and Baker* as settling the law, when we see the judges labouring under such difficulties as to declare, that they will confine themselves to the particular cases under consideration, without laying down any general rule on the subject.

But when we find that a rule has been settled, which is found to be in analogy with all the settled principles of law, and has stood the test of long experience, we ought not to give it up for one which never had more than an ephemeral existence.

The great objection, that a person shall not be permitted to develop his own shame, appears to me to be founded on mistaken principles. It is not a question whether a party shall be permitted to take advantage of his own wrong, but whether a witness may not be required or permitted to disclose a fraud, although he may have been a party to it. How far such a circumstance may go to affect the credit of the witness is a distinct question. I am not aware of any rule of law which renders a witness incompetent, on account of his having committed a fraud; unless he has been convicted in a court of justice of perjury or some infamous crime. A witness may be competent and yet unworthy of credit

The objection ought, therefore, to go to his credibility and not to his competency.

I have not entered into a consideration of the cases where the question has arisen in the American courts. In many of them, the subject has been very learnedly discussed: But the ablest judges have been divided in opinion upon it, and therefore, can afford us but little aid in forming a judgment upon it. I think, however the current of opinion is running the course which we have gone; and I have but little doubt, that except where they are too tightly trammelled, hy, perhaps, I may say, hasty decision, of their own courts, they will ultimately come to the same conclusion.

Believing the decision to be founded on correct principles and calculated to preserve the symmetry of the law, we are opposed to granting a new trial. (c)

King, for the motion.

Pepoon, contra.

(c.) In *England*, at N. P. it has lately been decided, that, "the joint acceptor of a bill of exchange is not competent to prove a sett off in an action by the holder against the drawer;" (*Mainwaring vs. Mylton*, 1 *Starkie's Rep.* 84;) and in the case of *Hardwicke vs. Blanchard*, (1 *Gow* 113,) that "in an action against the acceptor of a bill of exchange, accepted for the accommodation of the drawer, the latter is not a competent witness to prove that the holder discounted the bill on usurious terms." So, in *Jones vs. Brooke*, 4 *Taunton* 464, in action against the acceptor, the drawer was held incompetent to prove usury; because the court said he did not stand indifferently. Sir *James Mansfield* in delivering judgment says, "an objection was made to the witness, who was the wife of the drawer, and the objection was overruled, on the ground that it is now the practice to receive persons whose names are on bills of exchange, as witnesses to impeach such bills. And so it is; but here the question is &c." and he goes on to shew that the drawer's interest was on one side, and not on the other, being liable to the acceptor for any losses he sustained, and was therefore interested to protect the acceptor.

In *Massachusetts*, the rule in *Wallon* and *Shelly* prevails, so far as relates to negotiable securities. See *Barber vs. Prentiss*, 6 *Mass. Reports* 434. *Jones vs. Cookidge*, 7 *Do.* 199. *Parker vs. Hanson*, 7 *Do.* 470. *Manning vs. Wheatland*, 10 *Do.* 502. *Parker vs. Lovejoy*, 3 *Do.* 565. *Warren vs. Merry*, 3 *Do.* 27. *Widgery vs. Munroe*, 6 *Do.* 449. *Churchill vs. Suter*, 4 *Do.* 156. *Storer vs. Logan*, 9 *Do.* 55.

But this rule does not extend to deeds of conveyance. *Inhab. Worcester vs. Eaton*, 11 *Mass.* 368. *Loker vs. Haynes*, 11 *Do.* 498; for a party to a deed of land, who is not interested, is competent to prove the deed fraudulent or void, *Hill vs. Payson*, 3 *Do.* 559. But one who has undertaken to convey is incompetent to prove he had no title. *Storer vs. Balson*, 8 *Do.* 431. Nor does the rule extend to bills of lading, *Brown vs. Babcock*, 3 *Do.* 29.

In *Pennsylvania*, the rule in *Walton & Shelly* prevails, but is confined to negotiable instruments actually negotiated in the usual course of business. *Baird vs. Cochran*, 4 *Serg. and R.* 399. *Blagg vs. Phoenix Ins. Co.* cited from *M. S. Rep. Pleasant vs. Pemberton*, 2 *Dall.* 196. 1 *Yeates* 202. *Baring vs. Shippen*, 2 *Binn.* 165, 168. *McFerran vs. Powers*, 1 *Serg. and R.* 102. *Stille vs. Lynch*, 2 *Dall.* 194. *Shaw vs. Wallis*, 2 *Yeates* 17.

And it has been held there, that bonds though assignable instruments by A. A, are not negotiable (*Baring vs. Shippen*, 2 *Binn.* 154,) and that the indorser of a note not negotiated until after the day of payment, is competent to invalidate it, by his testimony. *Baird vs. Cochran*, 4 *Serg. and R.* 296. See, also, cases forming exceptions, *Blagg vs. Phoenix Ins. Co.* cited above, *Wolf vs. Carothers*, 3 *Serg. and R.* 240. *Peterson vs. Wilting*, 3 *Dall.* 506. *Brown vs. Downing*, 4 *Serg. and R.* 497.

In *New-York*, *Walton and Shelly* is adopted, as to negotiable papers. In *Baker vs. Arnold*, (1 *Caines' Rep.* 269,) Judge *Livingston*, said "for my part, it would give me less offence to see such a man expiating his fraud and effrontery in a pillory, than attesting heaven, in the sanctuary of justice, to the truth of asseverations, which at once evince his turpitude and destroy his credit." Judge *Kent*, in the same case, submitting to *Walton and Shelly*, still, observes, "it has been the bent of the courts for a century past, to enlarge the rule respecting the competency of witnesses."—"And I could wish to see this other rule, of witnesses being incompetent, on grounds of policy, rendered equally manageable, by being reduced to limits susceptible of equal definition and certainty To do this, we must adhere strictly to the cases which produced the rule, and exclude only the witness, who is called to impeach his own paper, by showing it to have been immoral or illegal when he put his name to it." See also, *Winter vs. Saidler*, 3 *John. Ca.* 136. 3 *Do.* 206. 2 *John. Rep.* 165 But a party to a negotiable instrument, after it has been discharged, is a competent witness to show usury in the transaction. *Dunham vs. Day*, 2 *John. C. C.* 192.

R.

JOHN BRAKER *ads.* CHARLES KNIGHT.

This court will entertain appeals from all orders made at chambers, which are, in their operation, conclusive as to the rights of the parties; as all motions for the benefit of the prison bounds act, &c.

A defendant against whom a verdict for damages has been found, for killing the slave of the plaintiff, is entitled to the benefit of the prison bounds act.

The cases excluded from the benefit of the act, "as wilful and malicious trespasses," are such as are included in the statute of 22 & 23, Car. II c. 7 by "malicious mischief." (a.)

This was a motion before Mr. Justice Richardson, to reverse an order made at chambers, and to discharge the defendant under the prison bounds act.

This was an action of *trespass vi et armis* for shooting the plaintiff's slave. The declaration simply alleged, that the defendant had shot off, and discharged a gun at and against the said slave, and so greatly shot, hurt, and wounded him that by reason thereof, the said slave died. The second count simply alleged, that defendant so greatly hurt, beat, and wounded another slave, the property of the plaintiff, that the slave died. The damages were laid at \$2,000, and a verdict was found for \$725, with interest from the 28th December 1818.

The defendant, being in custody of the sheriff, petitioned for the benefit of the prison bounds act, and was brought up, before Judge Bay, at Chambers, but he refused the prayer of his petition; because he considered the defendant embraced within the exception in the act. (2 *Brevard* 160.) (b.) From this order, made by Judge Bay at Chambers, an appeal was made to Judge Richardson, sitting in court last January term, who decided that the course by appeal to the court, to set aside the judges order, made at Chambers, was regular, as a general rule; but he held that in

(a.) See note to *Walling vs. Jennings*, 1 *M'Cord*, 12.

(b.) The exceptions are in these words, "or if he or she is confined on account of wilful maim, or wilful or malicious trespass, or for voluntary or permissive waste or damages done to the freehold." &c.

this case, a special jurisdiction was created by the act and that the order of the judge made under a petition for the benefit of the prison bounds act, was final and not the subject of appeal, whether it were for or against the petitioner.

A motion was now made to reverse the order of Mr. Justice *Richardson*, and for leave to enter an order discharging the petitioner, upon the ground that an appeal did lie from the order of Judge *Bay*, at Chambers, and that Judge *Richardson* erred in refusing to discharge the defendant.

Grimke, for the motion.—Writ of error is a writ of right, except in treason or felony. Right of appeal is a paramount constitutional right. (*Hartshorne vs. Sleght*, 3 *John. Rep.* 556. *Horton vs. Allen*, *N. C. Rep.* 158.) Where there is a new jurisdiction which proceeds according to the common law, a writ of error lies; but where the court acts in a summary way or in a new course, different from the common law, there a writ of error does not lie, but a *certiorari*. This jurisdiction of the judge is not new. No doubt about the right of appeal. The only question is about the mode of getting at it. The practice has settled it if nothing else.

Dunkin, contra—Thinks the appeal should be direct from the judge at Chambers to this court. Malice is a technical distinction. Contends if the trespass proved be malicious, the only course is to refer the case to a jury to determine whether malicious or not. (Cited *Bampfild vs. Ellard*, 2 *McCord's Rep.* 182.)

Grimke, in reply—Cited *King vs. Wilkes*, 4 *Burr.* 2571. *Carpenter vs. Coleman*, 2 *Bay* 436, to shew the proper mode of appealing is from the judge at Chambers to the next judge in term time, and from the court below to this court. The Master of the Rolls, in term time may reverse an order made by the Chancellor in vacation. The case of *Huger vs. Lynds*, (c.) is decisive if the law be correctly laid down.

(a.) The Reporter is not aware from whence this case is cited.

JOHNSON, J.—The court do not deem it necessary to follow the counsel through their researches, on the question whether an appeal to this court does or does not lie from an order made at Chambers, by a circuit judge. From the first organization of a court possessing appellate powers, it has so far, as I have been able to learn, been the usage of the court to entertain appeals from all orders made at Chambers, which in their operation, were conclusive, as to the rights of parties; and such is the effect of the order complained of in the present case. If it be granted that the prison bounds act created a special jurisdiction and invested it in the circuit judge, as has been argued, it would, as an inferior jurisdiction, fall under the general supervision and control of the court of sessions and be subjected to the process of *mandamus*, prohibition &c. and to avoid the incongruity of applying to one circuit judge for these processes against another and the circuity of bringing it up, though the circuit court, was doubtless of the origin of the usage referred to. It is convenient in practice, and tends to the prompt administration of justice; and the court see no reasons for departing from it.

The remaining question is, whether the defendant is or is not entitled to the benefit of the prison bounds' act. (*Public Laws*, 456.) His claim to it is resisted on the ground, that the cause of action, for which he is arrested, and now in confinement, falls within the exception, contained in the act, which excludes all who are committed on execution, for "wilful and malicious trespass." There is some difficulty in determining to what class of injuries those terms were intended to be referred. If we look to the injuries for which the common law provides remedies, we find that there are others which correspond precisely with this definition. The injuries for which the action of trespass *vi et armis* lies, approach more closely than any others. But that it was not intended to cover the whole class, is apparent from the act itself. "Wilful maihem" and "damages done to the freehold" would fall within it; and these are expressly provided for in the act,

which would have been unnecessary, if they were intended to be included in the general terms. On the maxim, therefore, that *expressio unius est exclusio alterius*, this exception must be referred to some other subject. This view of the subject is supported by the current of decisions on the act; for, although, the court have not heretofore laid down any general rule on the subject, in the case of *Pampfield and Ellard*, (2 *M'ord*, 182,) it was held that a defendant arrested on a *ca. sa.* in an action of trespass, for an assault and battery, was entitled to the benefit of the act; and in *Walling and Jennings*, (1 *M' Cord*, 10,) which was an action of slander, the same order was made. The statute of 22 and 23 Car. II. c. 7. (*Public Laws*, 80. 2 *Brev.* 36,) has given character to a class of cases which clearly fall within the terms of the exception to the prison bounds act. The 5th section of the act provides that, "if any person shall in the night time maliciously, unlawfully and willingly maim, wound, or otherwise hurt any horses, sheep, or other cattle, whereby the same shall not be killed, or utterly destroyed, or shall destroy any plantations of trees, or throw down any inclosures, in manner aforesaid; that then every such offender or offenders shall lose and forfeit, unto the party grieved, treble the damage, which he or they shall thereby sustain; the same to be recovered by action, &c." In this statute we have a plain and practical application of the terms, "wilful and malicious trespass," used in the prison bounds act, and to these injuries, the legislature, doubtless, intended to refer, by their use. The court do not intend to be understood to adjudge that there are no other injuries to which these terms would apply. The statutes made of force, and the acts of the legislature, may have given the same denomination to other wrongs than those enumerated in this statute, and to which the exception would as well apply, for the same reason; but if any such exist, they have escaped the observation of the court.

The court are, therefore, of opinion that the present case is not included in the exception, and it is ordered that the order to remand the defendant be reversed and that he be

admitted to the benefit of the act, on his complying with its provisions.

Grimke, for motion.

Dunkin, contra.

WILLIAM FREAN *ads.* WILLIAM CRUIKSHANKS.

Where a party's domicile is still in the state, though he be absent from the state, yet the service of a writ, by leaving a copy at his usual place of residence, is good.

But the court will suffer the defendant, upon shewing the circumstances, to come in and plead, at any time before judgment; and even after judgment the court will, upon merits shewn, open the case and let the defendant into his defence, if he had not an opportunity of coming in before.

When the declaration in trespass, *clausum fregit* and to try titles, describes the premises too generally, the verdict can not cure it, by a finding with a proper distinction of the *locus in quo*. And where the jury do give such a verdict, such further description, than that contained in the declaration will be surplusage.

Where the declaration stated that the defendant "did break and enter the lot and close of the plaintiff, in State street, in Charleston aforesaid," and the verdict was "We find for the plaintiff the within lot of land, situate in State street, in front on said street 26 feet, in depth from F. to W. 86 feet bounding to the N. on lands of A. F.—E. on State street aforesaid—W. on lands of E. and S. on lands of M. with \$400 damages," the court held, that the verdict contained surplusage, as to the metes and bounds, but supported it as a *general verdict* for the plaintiff.

The declaration need not describe the *locus in quo* so particularly and specifically, that the sheriff may certainly know it to deliver possession of it, it is sufficient that the description is good to a common intent, or described as it is generally known or understood.

If the *locus in quo* be not sufficiently described, the plaintiff may point it out to the sheriff and take the possession at his peril.

The act which authorizes a survey in trespass to try title is not imperative, and was never designed to be used when unnecessary. Either party may resort to it, to prove the identity of their lands, where they have not other sufficient evidence thereof.

Where judgment goes by default, evidence of the *locus in quo* is unnecessary.

This was a motion, at chambers, to set aside the proceedings in this case on the ground, that the copy writ was left at defendant's house, at a time when he was out of the

state, at New York. A motion in arrest of judgment, was made at the same time for reasons contained in the following statement of the court.

The motion was made before Mr. Justice *Bay*, who sent up the following report to the appeal court, "When this motion was first made by Mr. *Hunt*, I was disposed to grant it, as the words of the act, of 1720, (*Public Laws*, 109,) are express upon the subject. The 6th clause of the act declares, that in all civil actions, the original process shall be by writ to attach the body of the defendant, and if he cannot be found a copy may be left at his dwelling house or usual place of residence; and the clause contains a proviso, that no execution or any judgment shall be granted against the body or goods of defendant, until 30 days next after such judgment obtained; and that nothing in the said act contained, touching the making any person a party in court, without arresting or attaching the defendant, shall be construed or extended to any person or persons gone off from this settlement, (meaning state or province) and not being actually resident in the same, at the time when such copy of the writ shall be left at the house of such person as aforesaid. Upon the plain construction of this latter clause of the act, the uniform practice of our courts has been to set aside all writs, and proceedings under them, which were left at the dwelling houses or places of abode of defendants at a time when such defendants were out of the state. And an affidavit was produced in this case, stating that defendant was at New York, on the day when the copy of the writ was left at his dwelling house, in State street, in this city: In consequence of which, I was on the point of making an order for setting aside the proceedings, when further time was requested to procure some further affidavits, which, it was alleged, would throw some further light upon the subject, which was granted. Upon the 2nd day, when this motion was renewed by Mr. *Hunt*, Mr. *Prioleau* urged, that the object of the act of 1720, was to prevent surprise and to guard against the inconvenience of a man's having a

judgment obtained against him without his having an opportunity of making his defence; and he produced some affidavits to shew, that the defendant had this opportunity afforded him, (notwithstanding the writ was left at his house, at a time when he was at New York,) to make his defence if he pleased; but that he stood by and did not move to set aside the judgment by default against him and plead to the action, but suffered a writ of enquiry to be executed for damages, and judgment to be entered against him. That it never could have been the intention of the act of 1720, to permit a man, who had gone out of the state, for a short time, and returned back, time enough to make his defence to the action after due notice, to screen himself under the technical words of the act, of being out of the settlement when the writ was left at his house or place of residence. Such a construction, he contended, was contrary to the spirit and intention of the act, which was only intended to guard against surprise; and for that purpose, he relied on the case of *Lark vs. Chappel*, tried at Laurens, spring term, 1822, in which, it appeared, that a copy of the writ was left at defendant's house, while he was in Georgia. Upon a motion to set aside the proceedings, upon an affidavit, stating "that he was out of the state, when the copy was left, to wit, in Georgia;" without saying he was surprised or was in danger of suffering injury by his not knowing of the service, the court refused to set it aside, as the party might reside on the borders of the state and only have gone into his fields or any small distance out of the state, in order to avoid service of legal process. (1 M'Cord, 566.) Upon the authority of this case, therefore, which I had never seen before or heard of, I changed the determination I had come to, founded on the former decisions of the court, and refused the motion, for the sake of uniformity in our decisions, although only three judges concurred in the opinion quoted.

There was still a further ground taken in the case, in arrest of judgment; viz: that the premises were not sufficiently described in the declaration, so as to enable the sheriff to

give possession of the premises by metes and bounds; and that the jury, in their verdict, took upon themselves to supply this defect by inserting metes and bounds therein. The description in the writ was, "that the said Wm. Fream did break and enter the lot and close of the said William Craikshanks, in State street, in Charleston aforesaid." The description in the verdict is in the following words: "We find for the plaintiff the within lot of land situate in State street, in front on said street twenty-six feet, two inches, and in depth from east to west eighty-six feet, bounding to the north on land, now or late of Ann Ferguson, eastwardly on State street aforesaid, westwardly on land partly of John Cart and partly of Ann Ferguson, and southwardly on land of the estate of J. Mathews, with \$400 damages." Upon this point, I was of opinion that although the old law was very strict and particular in describing the nature, extent and quantity of lands, messages and tenements demanded in real actions, yet in the modern action of ejectment, (*Law of Ejectment*, 5,) many things have been added and improved by art and acquired new appellations that are perfectly well understood now by the law, that were not found in the law books; and as men began to contract by new names which were not known in the old law, so it was but reasonable to suffer the remedy to follow the nature of such contracts; which shows that the description is now more conformable to the general understanding of men, at the present day, than formerly. In this action, however, the law does not require that the thing demanded be so particularly specified that the sheriff may certainly know of what to give possession, if the plaintiff should recover. It is sufficient that the description is good to a common intent, or described in a manner in which it is generally known and understood. The old rule, (*Cottingham vs. King*, 1 Burr. 627,) about the sheriffs being necessarily to be informed so exactly on the record "what he is to deliver possession of" is now out of use; and the practice is otherwise; for the sheriff now delivers possession according

to the directions of the plaintiff, who therein acts at his peril and he is only to take what he has a title to. (2 *Bacon* 419. 1 *Burr*. 628-9-30.) This doctrine is confirmed by Lord *Mansfield* and all the Judges of the King's Bench. An ejectment will lie for an orchard; because it is a word of certain signification, it being well enough understood. (4 *Bacon* 419. So an ejectment will lie for a stable, because it is a word of determinate signification. (4 *Bacon* 419.) So an ejectment of an house is good, for the import and certain signification of the word *domus* or house, is well enough understood in the law. (2 *Bacon* 420. *Palm*. 337. *Hutchinson vs. Puller*, 3 *Lev*. 97.) With respect to the verdict and the finding of the jury sup'ying the defect in the declaration, as alleged, I observed that it is laid down in the books, that a verdict, not only cures such defects as may be called artificial defects, and come within the statute of Jeofails, but also natural defects, or the omissions of the parties in their allegations, which must be presumed to have been given in evidence to the jury, otherwise they could not have found a verdict for the party. By which is meant all matters of form, and not matters of substance; which must be determined in every case according to the nature of it. For these reasons, I refused the motion in arrest of judgment."

An appeal was taken upon the grounds.

That the writ was served during the defendant's absence from the state, so that he had no opportunity of appearing, as appeared by affidavit.

Also on arrest of judgment, on the ground, that the declaration set out no specific lot or premises. An order for judgment was made and afterwards, a jury who in such cases can only assess damages, undertook to supply the record, by finding for the plaintiff, premises not defined. Also, because there was no rule of survey to ascertain the metes and bounds; and because the writ of execution, founded upon an unauthorized judgment was irregular.

Hunt, for the motion.—A copy writ left at defendants house, while he is absent from the state is bad service. (*Pub. Laws* 109.) Where party is out of the state the suit must be by attachment. The true principle relating to service of writs is decided in 1 *Nott & M'Cord*, 90. In *Lark vs. Chappell*, (1 *M'Cord* 566,) only the particular case is decided; but so far as principles are involved, it is in favor of setting aside this service.

On the second ground, he said, the jury on a writ of enquiry can only assess damages. In all actions of trespass for lands, a survey is required by law. (*Pub. Laws* 119.) The pleadings do not set out the metes and bounds, which they are required to do by the 83d rule of court.

Prioleau, contra —Contended that the defendant was not surprised; and referred to the notice given by his attorney. *Lark vs. Chappell*, decides that the defendant must be surprised. Appearance of defendant by attorney cures all antecedent defects. (3 *Cranck* 490.)

As to the second ground; he said, in trespass for town lots, the metes and bounds need not be set out. (*Cro. Eliz.* 465) After verdict, this description will be held sufficiently certain. (1 *Burr* 628.) Ejectment does not require great certainty. (5 *Burr.* 2672. 1 *Salk.* 264. 2 *Wm. Black. Rep.* 706. 2 *Strange* 695. 1 *Lord Raymond* 191. 1 *T. Rep.* 704. 1 *Bac.* 160. 5 *Bacon*, 368. 2 *Bac.* 419, 420. The law merely authorizes the court to order a rule of survey, and is not imperative.

Hunt, in reply.—The defence, in which the defendants counsel is instructed, was given by defendants wife, in whom the property really is. The defendant has no interest in the case; which is the substantial defence. He referred to the affidavits. Did not deny the authorities that ejectment lies for a house, orchard, &c. The objection is, that the verdict describes the premises, when the declaration does not.

JOHNSON, J.—In the first place, the defendant moves to set aside the service of the writ, on the ground, that when the copy was left at his house he was out of the state at New-

York. The fact, that the defendant was out of the state at the time, is not denied, and the evidence shows that his domicile was in the city of Charleston. His family resided there, and it is impossible to distinguish the case from that of *Lark vs. Chappell*, (1 *McCord* 566.) Laurens, the district in which the defendant in that case lived, is not a frontier district, and the case there put, of one living on or near the boundary line of the state, is only used as illustrative; and for any thing that appears his visit to Georgia, might have required as much time as the present defendants to New-York. But independent of this authority, it appears to the court that the act of 1720, contemplated and intended to provide for the precise state of things existing in this case. The inconvenience incident to the necessity of a personal service, and the probable delay resulting to the plaintiff, suggested, no doubt, the provisions of the act. But, in its operation, it is not only calculated to give facilities to the plaintiff, but operates as a great convenience to the defendant; as it supercedes the necessity of proceeding by attachment, which is always inconvenient and often injurious and oppressive to the defendant. The cases in which the act authorizes the service of the writ, by leaving a copy at the dwelling house or most notorious residence or habitation of the defendant, are, where he absconds or absents himself so that he cannot be found, without any limitation or specification as to time or place. Now his absconding or absenting himself are the circumstances which authorize this mode of service; and, if warranted in a case where the defendant secretes himself about his own house or plantation and where it might be possible to find him, surely the reason would operate still more powerfully where he was out of the state and beyond the reach of the process. The case of *Gadsden vs. Johnson*, 1 *Nott and McCord*, 89, has been relied on in support of the motion, as containing the principle on which this case must be decided; but they are not analogous, nor does that case in any manner interfere with the case of *Lark vs. Chappell*. There the

defendant had abandoned his town residence when the copy was left there, and his country residence, to which he removed, had in the language of the act, become his dwelling house, and his most notorious place of residence and habitation; and the true criterion is, whether the defendant had or had not abandoned the domicile at which the copy was left. If he had, but one hour before, the service would have been bad; and if he had not, it would have been good, wheresoever he might have been at the time. Arguments, *ab inconvenienti*, have been drawn from the circumstance that the defendant might, by this mode of service, be deprived of the right to defend the action; but it may be answered, that a prudent man ought not, and probably never would, leave his residence for any length of time, without leaving an agent instructed in his unsettled affairs, and who would apprise him of any matters which might require his attention. But these evils are in a great degree imaginery; for by the practice of the court, the defendant would on showing the circumstances be allowed to come in and plead at any time before judgment; and even after judgment, the court would, on merits shown, open the case and let the defendant into his defence if he had not an opportunity of coming in before.

On the motion in arrest of judgment the court concur generally with the presiding judge, for the reasons expressed by him. It is impossible, from the nature of things, that the record can so describe the *locus in quo* that a stranger would be able to identify it, with the same certainty that he would the face of a friend. Certainty, to a common intent, is, therefore, all that can be practically required. The objection, that the verdict contains another or further description than that contained in the record cannot avail the defendant; although the court concur with the counsel, that so far as it goes to describe the premises it is unavailing. By the default of the defendant, the plaintiff's title in the premises, described in the record, was admitted; and the only question over which the

jury had any power was the *quantum* of damages. (a) But supposing that the question of title was properly submitted to them, they could not travel out of the record to determine the title to a different *locus in quo*. If that described in the verdict be the same mentioned in the record, it is well; no injury has been done to the defendant; if it is not, it is irrelevant and surplusage, and will not impugn the verdict, so far as it appears to be the matters submitted to the jury. It must stand, therefore, as a general verdict for the plaintiff.

The ground taken that the plaintiff had not procured a survey of the premises, under a rule of court, cannot be sustained. The act which authorizes a survey to be made is not imperative, and certainly never was designed to be used when it was unnecessary. Either party may resort to it, when, for the want of other evidence of identity, it becomes necessary; but when they think proper to put their rights upon other evidence, it would be a strange construction to compel them to provide more than was necessary; for many cases occur particularly in towns and villages, where the identity can be otherwise as certainly and satisfactorily established. In this case there is another reason which would operate. The judgment by default was conclusive, as well to the *locus in quo*, as to the plaintiff's title. He was not therefore under the necessity of producing any evidence on the point; and to have required him to procure evidence, which there was no necessity to use, would be unreasonable:

Motion dismissed.

Hunt, for the motion.

Prioleau, contra.

(a.) All the evidence that is necessary in such a case, where the plaintiff merely goes for his title and not for damages, is to take care that he prove damages enough to carry costs. So ruled by Judge Nott, sitting for Judge Huger, at *nis prius*, in *Lee vs. Sawyer*, at Lexington, Nov. 1825. R.

JOHN LOWDEN *et. al.* vs. J. C. MOSES.

It seems that all laws ought to be prospective in their operation, and where they are not so, but interfere with past transactions or contracts, they are inconsistent with the principles of sound legislation and void.

The right of the plaintiff to imprison his debtor until he pays the debt, forms no part of the *lex contractus*. The obligation to make satisfaction, must always exist; and the right to discharge a debtor from prison, upon a surrender of his property, does not affect the right of satisfaction; but is a part of the *lex fori*, with a view to which people always contract, and therefore becomes a part of the *lex contractus*. It does not impair the right of the creditor over future acquisitions of the debtor.

The right to imprison the debtor is no part of the contract, but a punishment for not performing it, which the state may refuse to inflict, or may modify or discharge, and the contract is still left in full force

A vendue master, imprisoned under a *ca. sa.* at a time when vendue masters were prohibited from the benefit of the prison bounds and insolvent debtors act's, upon a revocation of the act depriving vendue masters of such benefit, is entitled to the benefit of the repealing act, and are put on a footing with other debtors.

Not filing a schedule within forty days, only deprives the debtor of the benefit of the *prison rules or limits*, but does not deprive him of the final benefit of the act, but he may render it in at any time during his confinement.

A vendue master not having rendered a schedule within forty days, at a time when he was deprived of the benefit of the insolvent debtors and prison bounds, acts, is not precluded, when the privilege of those acts are again restored to vendue masters by the legislature.

This was a motion made by the defendant in Charleston, before Judge Bay at Chambers, for the benefit of the prison bounds act. The defendant had been a vendue master, and had sold goods for the plaintiffs to the amount of about \$17,000. In the mean time Moses failed and the plaintiffs brought actions, and obtained judgments and executions against him, in June 1821, and under these executions he had been confined to the Charleston gaol, nearly two years. And now this motion was made in May 1824, on his part, for the benefit of the prison bounds act.

To this motion it was objected, that the defendant was not entitled to the benefits of the act, as the legislature by their act of 1815, deprived vendue masters of the benefit of the prison bounds and insolvent debtors law, "in all cases,

where his or their debt or debts arose from not paying to the owner or owners who shall place property in their hands for sale, the proceeds of the property so disposed of."

To this the defendant replied that the act of 1815, was repealed by the act of the 20th December 1823; and that now he stood upon the same footing as other debtors, and was entitled to the prison bounds and insolvent debtors acts.

The plaintiffs on the other hand contended that when the judgments were obtained against the defendant, and he was committed to prison, he was not entitled to the benefit of the prison bounds and insolvent debtors acts, and that though the act of 1823, did repeal the act of 1815, yet the defendant could not be benefited thereby, as the act of 1823 could not affect in any way vendue masters, committed at a time previous to that act. That under the act of 1815, the plaintiffs had a right to imprison the defendant until he paid the debt; and the act of 1823, could not by a retrospective operation, affect such right. That the act of 1823, was entirely prospective, as all laws should be, and could not operate upon cases, occurring previous to its enactment. That the legislature never intended it to have such operation; and if it did, so much of the act would be void, as was retrospective and interfering with the rights of the parties arising from their contracts.

To this the defendant replied, that it was not interfering with any contract, nor was it retrospective, in the sense so objectionable to sound legislation; but that imprisonment was a mere process for enforcing contracts and duties which could be modified, altered and abolished, at any and at all times, as to any and all suits.

It was also objected on the part of the plaintiff, that the prison bounds act, (*Pub. Laws* 456,) did not allow the benefit of the act to any prisoner under *execution*, who had not filed his schedule within forty days. And the defendant replied to this, that that exception did not apply to cases like his, where it would have been idle to have filed his

petition and schedule previous to the act of 1823, allowing him the benefit of the prison bounds act.

The case was argued at length and learnedly, by Messrs. *Prioleau* and *Holmes*, for the motion.

And by Messrs. *King* and *Gadsden* for the creditors.

Mr. *Prioleau* and Mr. *Holmes*,—In reply to the arguments against the motion urged that the opposition made by the plaintiffs in these actions was cruel and oppressive in a high degree, as defendant had already been confined in jail twenty two months; and to confine him in jail the remainder of his days could answer no good purpose to the plaintiffs themselves, as he was totally unable to pay the debts at present; and incarceration in a jail, would render him unable to use any means for bettering his condition in life, so as to enable him to pay off those debts by his future industry. Besides, it would not only be punishing the defendant, but also a wife and nine or ten helpless children, whose only dependence for their future support was on the industry and exertions of a husband and father. That the principle contended for was not only cruel in itself, but it was inconsistent with civil liberty and the true policy of the United States, and of every state in the union. For the state of which he was a member, had a right to his services as a freeman, in the capacity of a militiaman, to aid in defence of his country and as a juror to aid in the execution of the laws of his country and in the discharge of other civil obligations as a citizen. For these and many other reasons, the sound policy of our laws and the principles of the general and state governments would not permit or suffer the doctrine of perpetual imprisonment to exist in this land of freedom. They admitted, that part of the act of 1823 was prospective in its operation; but that the first clause was a general, distinct, independent clause, merely repealing the act, without relation to any existing contract whatever, and that when this barrier was removed, there was nothing which stood in the way of the defendant's discharge. That to contend that a legislative body, in

whom the supreme power was vested, could not pass laws to liberate debtors, was in effect to cripple it in one of its most essential prerogatives. That the principle, so strongly urged on the other side, of a vendue master pledging his body as a part of the original contract, and making it a part of the *lex contractus*, is fallacious in the extreme. It had no foundation to support it, but the ingenuity of construction given by the opposite counsel. A vendue master's contract is like that of every other debtor in its original creation, to wit, that he will pay the debt; and like every other man his body and his goods may be taken in satisfaction of the debt. But this is not by any express contract on his part, but by the operation of the general law of the land which subjects his body and goods to make this satisfaction, and is to be taken *sub modo*; that is, subject to such restraints and conditions as the *lex fori*, or general law of the land shall from time to time ordain and establish. Before the act of 1815, vendue masters' debts stood upon the same foundation as all other debts; but that act said, a vendue master should not have the benefit of the insolvent laws. This formed no part of the original contract, but it was a condition prescribed by a power over whom the debtor had no control, and which deprived him of that privilege. It was a condition of the *lex fori*, not of the *lex contractus*, and the same power which created this condition could take it away; and when it was removed and taken away, then the parties were restored to their original situation, according to the general laws of the land. That the legislature has a power to pass laws to liberate debtors cannot at this time be a question. In the state of Rhode Island, they had no insolvent laws. The power was exercised by the legislature only. In 4 *Wheaton* 136, it is expressly laid down that a state has a power to pass insolvent laws. It was so determined by Judge *Chase* in Connecticut. Judge *Wilson* ruled the same point, and so did Judge *Elsworth*; and chief Justice *Jay* held that the power was inherent in the state legislatures to pass

laws for the relief of insolvent debtors from perpetual imprisonment. In all these cases, it has been determined, that the passing of insolvent laws, does not of itself impair the obligation of contracts, but only amounts to a provision, which the wisdom of the nation or state has directed for the relief of a debtor from punishment for non-performance of a contract, which a state may refuse to inflict, leaving the contract in full force and the debtor still liable upon it. The act in question does no more. In 1 *Nott & M'Cord's Rep.* 486, in our own courts, it is laid down that imprisonment for debt forms no part of the *lex contractus*.

In answer to the objection made, that the schedule was not filed within 40 days after the original arrest, it is sufficient to say that the defendant was deprived of the benefit of the act. It would have been a vain and idle thing for the defendant to have filed a schedule, as a preparatory step to his obtaining the benefit of the act, when the act of 1815 had expressly taken that privilege away from him; and the law will not impose it as a duty on any man to do a vain or idle thing. But as soon as the disability was removed, the schedule was filed preparatory to his making the present application.

After taking some time to consider, BAY, J. on another day delivered the following opinion.

In delivering my opinion, I shall not travel over all the grounds taken by the able and ingenious counsel on both sides of this case; but only refer occasionally to the principles urged and laid down in the cases relied upon on each side. As a preliminary position, however, to this investigation, I must premise that I admit the force of all the authorities quoted to shew that all laws ought to be prospective in their operation, and that where they are not so, or where they interfere with past transactions or contracts, they are inconsistent with the principles of sound legislation and void, as contended for on the part of the counsel for the plaintiffs. This, therefore, is my answer to all that class of cases and authori.

ties so ably commented upon by the counsel who led in opposition to this motion upon that part of the present case. Having made this admission, I shall now proceed to examine the other material points insisted on in the course of the argument. And the first and principal one was, that it was a part of the original contract, on the part of the defendant, that in addition to his obligation to pay the debt, that his body in case of failure should be perpetually imprisoned for it. Now to support such a contract as this, so hostile to civil liberty, it was surely incumbent on the gentlemen to shew some express agreement by which defendant engaged to make this surrender of his liberty during the remainder of his life, or to produce some law to shew that such an agreement was implied. But no such agreement on the part of the defendant, either written or parol, was produced. No agreement in writing signed by the party to that effect, nor any offer made to prove or substantiate any parol contract of the nature or kind contended for; that branch of this supposed contract, therefore, must fail, as no express agreement has been brought forward to substantiate it. But, say the gentlemen, it is implied by law. And, here again, I must observe, that it was incumbent on them to shew in what part of the black lettered code, this implied or supposed contract was to be found. Surely it is not to be found in the Common Law, that noble and venerable system will warrant no such presumed construction. (a.) And if it was contained in any statutory re-

(a) I confess his Honor regards the Common Law as more noble and venerable than I do; and I think it is only necessary to refer to a principle of the Common Law as sanctioned by his honor, in the case of *M'Clain vs. Hayne*, (1 Const. Rep. 221. Tread. Ed.) to convince most men that its doctrines, as they have been some times expounded, are not the most benignant or perfect in the world. "For if one (says C. J. *Montague*) be in execution he ought to live of his own, and neither the plaintiff nor the sheriff is bound to give him meat or drink, no more than if one distrains cattle, and puts them in a pound, for there the owner of the cattle ought to give them meat, and not he that distrained them, no more is the party or the sheriff, who has one in execution, bound to give meat to the prisoner, but he ought to live of his own goods, although he be in for felony until he be attainted, and this by the

gulation, it was equally incumbent on them, to have brought it forward and have shewn it. As, however, no such implied con-

course of the Common Law. For before attainder the goods are his, and in his hands, and the common law in this point is confirmed by a statute; (1 R. 3. cap. 3.) and if he have no goods, he shall live of the charity of others, and if others shall give him nothing, let him die in the name of God, if he will, and impute the cause of it to his own fault, for his presumption and ill behavior brought him to that imprisonment." (1 Plow. Rep. 69.) If C. J. Montague was correct in laying down the law, (Judge Noll thinks he was not. *M'Clain vs. Hayne*, *supra*) then it would seem the plaintiff has a right, at common law to impound the defendant like cattle, as a pledge till the debt be paid. But in this state it has been decided, (*Love vs. Lowry*, 1 M'Cord, 181,) that the plaintiff is liable, when the prisoner is insolvent, or his assets insufficient.

In *Manby vs. Scott*, 1 Modern 132, Mr. Justice Hyde, in delivering, in the Exchequer, his very able, and very curious opinion, which was adopted by all the judges, but three, out of the twelve, says: "If a woman be of so haughty a stomach, that she would choose to starve rather than submit, and be reconciled to her husband, let her take her own choice: the law is in no default, which doth not provide for such a wife. If a man be taken in execution, and he lie in prison for debt, neither the plaintiff, at whose suit he is arrested, nor the sheriff who took him, is bound to find him meat, drink, or clothes; but he must live on his own, or the charity of others: and if no man will relieve him, let him die in the name of God, says the law, and so say I. If a woman, who can have no goods of her own to live on, will depart from her husband against his will, and will not submit herself to him, let her live on charity, or starve in the name of God; for in such case the law says, her evil demeanor has brought it upon herself, and her death ought to be imputed to her own wilfulness." In answer to *Tyrrell & Twisden*, that the remedy in the Ecclesiastical Court was not sufficient to compel the husband to grant his wife alimony, he denies it and says, "with us the rule is, *Committitur Mare-cum or Prison de Fleet*. There the sentence is, *Traditur Satanae*. Which judgment is more penal? Take him *Gao'er*, 'till he pay THE DEBT: or, take him *Devil*, 'till he obey THE CHURCH." And yet their judgment is warranted by St. PAUL, "Whom I have delivered unto Satan." As much is said by our law, "*Excommunicato interdicitur omnis actus legitimus, illa quod agere non potest, nec aliquem convenire cum ipso, nec ORARE, nec loqui, nec palam nec abscondite vesci licet.*" The learned judge, in the same case always supporting, as he terms it, "the bone against the flesh," has laid down a method of procuring a divorce at common law, or as he calls it "taming a shrew." It may be of advantage to the reader. "One kind of divorce between husband and wife is, when action of trespass is brought against them, and the husband only appears, and process issues out against the wife, until she be waived and outlawed, she can never purchase her pardon, or reverse the outlawry, unless the husband will appear; so that if the husband please he is divorced. If the wife be outlawed by erroneous process, and the husband will not bring a writ

tract has been shewn to arise by implication or presumption either by the common or statute law, I am irresistibly brought to the conclusion, therefore, that this implied branch of this contract must fail, as well as the express part of it, which has been alleged. It appears to me, therefore, that this supposed engagement of the defendant to submit his body to perpetual imprisonment for debt, formed no part of the *lex contractus*, or original agreement. I do admit that when a man contracts a debt, that he contracts *eo instanti*, or comes under an obligation, to pay it or make satisfaction for it, and that this obligation remains, till such satisfaction is made: And this is the sum and substance of every such contract; indeed it is literally the *lex contractus*, both by the civil and common law. After this contract is made and entered into, then it is to be governed and regulated by the *lex fori*, or the general laws of the land; one of which is, that if the debtor does not pay and satisfy the debt, the creditor has a right to sue and im-

of error, he may by this way be rid of a shrew, and that doth countervail a divorce." See the cases in the *Year Books*, 14 Hen. 6. pl. 14. a.—18 Edw. 4. pl. 4. a. This opinion of Judge Hyde's will not only instruct the lawyer, but afford much amusement to the general reader. "I will conclude (says the judge) the general question, or first point, with the judgment of Sir Thomas Smith in his book of the Commonwealth of England. 'The naturalest and first conjunction of two, towards the making a further society of continuance, is of the husband and wife, each having care of the family: the man to get, to travel abroad, to defend; the wife to save, to stay at home, and distribute that which is gotten for the nurture of the children and family; is the first and most natural but primate apparence of one of the best kind of commonwealths, where not one always, but sometime, and in some things, another bears rule; which to maintain, God hath given the man greater wit, better strength, better courage to compel the woman to obey, by reason of force; and to the woman, beauty, fair countenance, and sweet words to make the man obey her again for love. Thus each obeyeth and commandeth the other, and they two together rule the house, so long as they remain together in one.' I wish with all my heart, that the women of this age would learn thus to obey, and thus to command their husbands: so will they want for nothing that is fit, and these kind of *flesh-flies* shall not suck up or devour their husbands estates by illegal trick."

See in *Ezra*, chap. 1. the judgment on Queen Vathij.

R.-

prison him. Then the humanity of the law steps in, and says to the creditor, although you have a right to imprison your debtor, in order to compel him to make satisfaction, yet you shall not imprison him for life; he shall give you up all that he has as far as it will go, and upon his doing so, he shall regain his liberty, but at the same time the original contract shall remain unimpaired, so that any future acquisitions he may gain by his future industry, shall be liable to pay the debt for which he was imprisoned or such part as may be due after giving up his all. Hence the origin of all bankrupt laws, and all insolvent laws; and they are founded in wisdom and justice as well as in the soundest policy. When a man has become insolvent by misfortunes in trade or otherwise and is confined in goal, it surely can answer no good or wise end to keep him immured within the four walls of a prison, where he can make no efforts to satisfy his creditors or support his own family; he is rendered useless to himself, his family and his country. Is it not, therefore, wise and politic to restore such a man to his liberty, that he may devote his future life, to satisfy all those just and reasonable claims upon him and support a family dependent on him? Surely no man can deny it.

In the next place is to be considered the nature of the remedy in such cases by the *lex fori* of South Carolina. The act to establish the bounds of prisons in addition to the insolvent debtors act and for the relief of insolvent persons, (the act under which the defendant now applies for relief,) recites that "whereas humanity requires that the confinement of persons on civil process should be less rigorous than it has, hitherto, been." It then goes on and enacts or prescribes the terms and the mode and manner in which the insolvent debtor should apply for his release from gaol and the conditions upon which such release is to be obtained. It then declares that a man who shall honestly and fairly give up and surrender all his estate, real and personal, to his creditor or creditors, or so much thereof as shall be sufficient to satisfy the debt or debts for which he may be confined, shall be, thence-

forth discharged and set at liberty: With a proviso that any future property he may acquire shall be liable for the demand for which he had been confined. Here then is the humane remedy which our legislature has provided against perpetual imprisonment, and which prescribes the terms upon which a man imprisoned may regain his liberty and once more be restored to society and his family. It at the same time expressly guards against any interference with the obligation of contracts, and leaves them unimpaired, and brings this act of our legislature within all the rules of construction laid down by chief justice *Marshall* in the case of *Sturges* and *Crowninshield*, and in the cases decided by Judge *Chase*, Judge *Wilson*, Chief Justice *Elsworth* and Chief Justice *Jay*, which were quoted and relied upon by the counsel for the defendant. 4 *Wheaton*, 198. It cannot be denied that our legislature by the act of 1815, did suspend the operation of this humane and benevolent act against vendue masters, for reasons which, no doubt, they thought sufficient to justify them in such suspension. But in the year 1823, they thought proper to remove that suspension for reasons which induced them, no doubt, to conclude that the suspension of the insolvent acts to that class of men, was unreasonable and unjust: But this was no interference with the obligation of any contract any vendue master may have entered into. It left all those contracts in the same state where the act of 1815 found them; and this is an inherent act of sovereign power which every state has a right to exercise as it thinks proper. Chief Justice *Marshall* (4 *Wheaton*, 200,) says "the distinction between the obligation of a contract and the remedy given by the legislature to enforce the obligation of it, is founded in the nature of things; without impairing the obligation of the contract, the remedy may certainly be modified as the wisdom of the state shall direct. Confinement of the debtor may be a punishment for not performing his contract, or may be allowed as a means of inducing him to perform it. But the state may refuse to inflict this punishment, or withhold this

means and leave the contract in full force. Imprisonment is no part of the contract, and simply to release the prisoner, does not impair its obligation." This opinion of so great a man, therefore, is to me conclusive as to the constitutionality of the late act, and proves beyond all doubt that it was no interference with the obligation of the defendant's contract, which was left where the act of 1815 found it, unimpaired. This late act was only opening the door which had been closed against the defendant, and gave him permission to go out, if he thought proper to comply with the requisitions of the prison bounds act, and it did no more.

The third and last ground which I shall observe upon, respects the filing of the schedule.

The act under which the defendant claims to be set at liberty, does to be sure require that a schedule of his property should be rendered in within 40 days after his arrest, otherwise he shall not be entitled to the *prison rules or bounds* prescribed by the act; but this only goes to deprive him of the privilege of remaining within limits prescribed by the act. (b.) The neglect or omission does not deprive him of the final benefit of the act; for the 4th clause of the act gives him the privilege of rendering it in at any time during his confinement; and the filing the schedule in January, 1822, was a compliance with the 4th clause of the act, if it had been necessary in this case to rely upon it. But the argument made use of by the defendant's counsel on that head was conclusive to my mind on the subject: viz, that it would have been an useless and absurd thing, to have given in a schedule preparatory to his taking the benefit of the act, when he was

(b.) It appears to the Reporter that this is true as to the prison bounds act, but he humbly submits, whether by the 6th clause of the *Prison Bounds Act*, (*Public Laws, 466*,) the prisoner under execution is not deprived of the benefit of the *Insolvent Debtor's Act*, if he do not file his schedule within 40 days of his actual confinement. The petition here was for the benefit of the *Prison Bounds Act*.

absolutely deprived of the benefit of the act itself. (c.) The last schedule, however, is strictly conformable to the act. Upon the whole of this case, therefore, I am clearly of opinion, that the defendant is entitled to the benefit of the act; and that this relief is neither unconstitutional nor against the obligation of the original contract.

From this decision the plaintiffs appealed on the grounds:

1st. That the act of 1823 is a prospective act, and cannot apply to the case of a vendue master in custody under the general law of the land and the special act of 1815.

2nd. That the law of 1815, under the sanction of the legislature, gave a special security for vendue transactions arising under it, which cannot be impaired by the act of 1823.

3rd. That the act of 1823 provides a special remedy for subsequent vendue contracts, and therefore should not be so construed as to destroy an existing security without extending to the case of security newly provided.

4th. That no schedule was filed by the defendant, according to the special provision of the prison bounds act, and therefore he was not entitled to its benefit.

5th. That, if the law of 1823 acts retrospectively and destroys an existing security, it is, so far as it regards existing contracts, under the laws of 1815, unconstitutional and void.

Argued, 28th Feb. 1825.

Gadsden, for the motion.—The act of 1815 was not repealed until two years after these judgments were obtained. The act of 1823, is entirely prospective, and cannot operate upon rights acquired under these judgments. To give it any other construction would be a violation of all principles

(c.) The necessity of the defendants situation, seems to have excused his not filing his schedule within 40 days in the case of *Crovet vs. Coburn*, ante, 14. But in that case, no distinction was made between the Prison Bounds and Insolvent Debtors acts, nor between the benefit of the mere *limits and rules* of the gaol, and the final benefit of the act. The case of *Crovet & Coburn*, seems to have been decided entirely under the 3rd clause of the Prison Bounds act.

of sound legislation. 2 *Dallas*, 386, 396. *Sturges vs. Crowninshield*, 4 *Wheaton*, 135. 2 *Gallison's Reports* 139. In *Dash vs. Van Klee*, 7 *Johns. Reports* 477, Judge *Kent*, says, laws criminal and civil must be prospective; and that a statute should not receive a construction which would give it a retrospective operation, if, capable of any other. This is a leading case, ably investigated. The case was an action for an escape, and the court held that the act should not extend to rights acquired by an escape, before the passing of the act. Shall we in this case divest a right fixed by the judgments? To shew that it interferes here with vested rights, it is necessary to enquire into the objects of the act of 1815. It was intended to guard against the *fraud* and *negligence* of auctioneers. All their abuses amount to the one or the other of these. They are, in some sort, public officers; and for their privileges are justly subject to disabilities. As a security to the public, the legislature did not choose that his fraud or negligence should be investigated in every particular case. It was therefore considered as something criminal, and it formed a case of fraud, analogous to the exceptions under the insolvent laws, on the supposition that property is concealed, which may be extorted, by imprisonment. But without the motive it was considered as a just punishment. It formed a statutory fraud; as under the statute of frauds contracts are presumed fraudulent unless in writing. So a trustee can not buy the trust estate, as fraud will be presumed. The same in case of young heirs. In the faith of this security, the goods were sent to auction, and the defendants have been convicted of the fraud under the act. The plaintiffs have a right to keep the body till the goods are produced. Suppose the case of an attachment from Chancery to enforce a decree; would not the release of the party attached interfere with vested rights? The act is certainly capable of prospective construction, and will you give it another? The legislature determined to

repeal the act of 1815, but they did not intend to do any thing unconstitutional. The act of 1823 provides that auctioneers shall give security to the city council. The former provision was intended as a security. But a person already in jail could not be forced to give this. This security was intended for the protection of the employer and for the faithful discharge of the duty of the auctioneer. This very question is decided in 4 *Dall.* 85.

As to the argument that these provisions belong to the *lex fori*, and not to the *lex contractus*: Suppose the insolvent laws were repealed, could a person be taken up who had been discharged?

King, on the same side—Submitted whether the act of 1823, was not intended to operate prospectively, and not to interfere with existing obligations. The assumpsit was made after the law of 1815; and the judgment, rendered before the repeal of the law, consummated their right to the security given by the act. This is different from other contracts, it is a breach of trust. Parties guilty of fraud are not entitled to the insolvent laws. How would the court distinguish this from the case of attachment out of Chancery, to compel the performance of a decree, which he had put it out of his power to perform? Would not equity give this remedy for this breach of trust?

Will the court say that they were deprived of one security, without being entitled to the other? As to the ground, that the schedule was not filed within forty days, he referred to the act itself which required it, (2 *Lrev.* 158, 160,) and to 2 *McCord* 266.

●*Johnson* Justice, enquired if the schedule was filed within forty days from the passing of the act of 1823, and it was answered that the act passed the 20th of December and the schedule was filed on the 27th, only six days afterwards.

The counsel for the defendant were stopped by the court; and on a future day, the court, without delivering any

formal opinion, stated that they agreed in opinion with that expressed by the court below, and dismissed the motion.

King and Gadsden for the motion.

Priolcau and Holmes, contra.

JOHN S. PEAKE vs. WM. CANTLEY & JAMES JOHNSON.

A magistrate, having jurisdiction of the subject matter, can not be made liable in a civil action, unless fraud or collusion be shewn; and such corruption must appear either from the grossness of the circumstances, or be proved *alimunde*.

The act of 1740, authorizing magistrates to seize and sell horses belonging to slaves, is constitutional; for slaves can hold no property, nor sue or be sued; and the exercise of such authority by a magistrate in determining whether the horse belonged to the slave or not, is a judicial act.

Tried before Mr. Justice Richardson, at Walterborough, Colleton district, in November term, 1824.

This was a summary process to make defendants liable for three horses, under the following circumstances. It appeared in evidence that prior to, and on the 22nd August 1822, the plaintiff was the legal owner of the horses in question; that some few days before, the defendant Wm. Cantley seized them, and delivered them to the other defendant, James Johnson, a justice of the peace, at the same time making an affidavit, that he believed them to be the property of negroes; whereupon the said James Johnson proceeded to sell the horses, under the 34th section of the negro act, (2 *Brev.* 238, *P. L.* 170-1) and obtained for the same the sum of \$69 25. The plaintiff being at the time sick, requested two friends to attend the sale for him; they accordingly did so, and having stated to defendant James Johnson the sickness of the plaintiff, they demanded the property in his behalf, forbid the sale and offered to swear that the property was the plaintiff's, and that they were present when the horses were purchased by him. The defendant James Johnson offered to deliver up

the horses, if they would take the oath prescribed in the act, but they refused to do so, because they could not.

On behalf of plaintiff, it was contended that although the defendant, James Johnson, under the act had jurisdiction of the subject matter, yet he had rendered himself liable by not complying with its provisions in the following particulars:

Because the act which is to be construed strictly, requires that the affidavit to be made by the party seizing, should set forth distinctly, that the property seized was kept, raised and bred for the use, benefit and profit of slaves, "and that it was seized in the possession of a slave or slaves," whose names should be set forth therein, and the affidavit of Cantey, upon which the defendant, James Johnson acted, was defective in the above particulars, as well as in stating simply the belief of deponent, that the horses were the property of slaves. It was further contended that he was liable, inasmuch as he had condemned and sold the horses without notice to the plaintiff, upon the ex parte and singular affidavit of Cantey, who was interested in the condemnation of the property, and had not reduced to writing the proceedings of the condemnation; and lastly because the act in question is unconstitutional and, therefore, void.

On behalf of the defendant James Johnson, (the other defendant not being represented by counsel) it was contended, substantially, that he could not be made responsible for an error of judgment, and that he was justified in condemning the property; as no affidavit, corresponding with the one prescribed by the act, had been made before him on behalf of the plaintiff.

The presiding judge decided that the defendant James Johnson, having jurisdiction of the subject matter, could not be made liable in a civil action, however erroneously he had acted; unless fraud or collusion could be shewn, but gave judgment against the other defendant.

A motion was now made to reverse the decision of the judge on the circuit, on the following grounds:

1st. Because the said James Johnson is liable, under the circumstances, for the value of the horses, inasmuch as he did not comply with the requisites of the act, to entitle him to condemn and sell the property.

2nd. Because the act referred to, and under which the defendant, Johnson, professes to have acted, is unconstitutional and therefore void.

JOHNSON, J.—The position laid down by the presiding judge, that a magistrate is not liable in a civil action for the consequences of an error of judgment, in a matter over which he has jurisdiction, is one which will not be controverted; and it is equally clear that to make him liable in such a case corruption must appear, either from the grossness of the circumstances, or be proved *aliunde*. It is not pretended that there is any proof on the subject; so that on reference to the first ground of the motion; it will only be necessary to enquire:

1st. Whether he had jurisdiction over the subject matter? and

2nd. Whether the circumstances justify the conclusion that he acted corruptly?

Without entering into a minute analysis of all the provisions of the act of 1740, (*Pub. Laws*, 171–2,) on which the proceedings before the defendant were founded. It will be seen at once, that all that was necessary to give the defendant, acting as a magistrate, jurisdiction over the matter, was that the horses should have been seized and brought before him, under a charge that they were kept, raised, or bred for the peculiar use and benefit of a slave; and that this state of facts did substantially exist is abundantly proved. In this state of things the act imposed it on him, as a duty, to take the oath of the person seizing them, concerning the manner of seizing and taking them, and if he is satisfied that the seizure was made according to the directions of the act, he is required to declare them forfeited, and to order them to be sold; and the only remaining question is, whether he acted with good faith in the discharge of this duty. In general,

this court would regard the decision of the presiding judge, on a question of fact, arising in a case within the summary jurisdiction, as conclusive; and this itself would furnish a sufficient answer to all the objections to the regularity of the proceedings. But if we examine them with the candour and liberality due to a tribunal constituted of such materials, as these for the most part must necessarily be, we are obliged to come to the same conclusion. It is true that the oath of William Cante, who seized the horses, is not drawn with all that technical precision which we should expect from a profound lawyer, or an experienced clerk, but it contains the most positive affirmation that the horses seized were not the property of any white person, and his confident belief that they were the property of slaves; and even admitting that it does not furnish strict legal proof of the fact, it may readily be believed, that an honest man might draw that conclusion. The same may be said of his rejecting the evidence of Josiah Perry and Thomas W. Boone, the friends of the plaintiff, and of his not giving notice to the plaintiff of the seizure of the horses. For although it is thought that it would have been his duty to have heard evidence, which might have been offered when the question was before him, whether they belonged to slaves or not; yet it may well be doubted, in the first place, when after he had given the order of condemnation, he was bound to hear any evidence, but that prescribed by the act itself, viz. the oath of the owner or other person having the lawful custody. And in the second place, it is proved by plaintiff's own witnesses that he was apprised of those proceedings, however informal the notice might have been. The general immunity which the law extends to magistrates in the honest exercise of their legitimate functions; is not denied; but it is contended, in support of this motion, that the powers delegated by this act is without the pale of their general authority, and that, therefore, in the exercise of it, the same protection is not extended to them. This idea is inferred from the assumption that it is a ministerial and not a judicial

power. In determining this question, we must look to the act to be done. If it involves only the exercise of judgment, then it is purely judicial, and if the execution of process, then it is purely ministerial. By the act the magistrate is required to take the examination of the persons seizing the horses, and if he is satisfied that they are the property of slaves, it is his duty to give the order of condemnation and sale; and if this power be tested by the foregoing rule, it is the exercise of judgment alone, and therefore exclusively judicial.

The second ground of the motion has been abandoned, and it is only now noticed to express the sanction of the court to the footing on which the counsel put it. The idea doubtless originated in the supposition that the act was an infraction of that article of the constitution which secures the right of trial by jury; and, as between the citizen owner, and other persons, there is no question that an act giving to justices of the peace, the power of determining the right of property of this value would have been unconstitutional. But by the laws of this state, slaves can have no property; neither can they sue or be sued; so that as respects them the question of property can never arise; and in this view of it, the act is a mere disposition of property which belongs to no one. Indeed the act itself seems to have avoided this difficulty by creating, in some measure, the owner or person having the legal possession of the goods the sole judge; for upon their taking the oath prescribed by the act, the magistrate is bound to restore to them, the possession of the goods.

The motion is refused.

Grimke. Legare and Grimke, for appellant.

Martin and Elmore, contra.

MARTIN STROBLE vs. DANIEL LARGE.

Covenant to erect a steam engine. Penalty \$1,000 In an action of *debt*, on the covenant, damages can not be recovered beyond the penalty. And a verdict for the penalty, with interest from the date, set aside, *nisi* interest be remitted.

The general rule is, that whatever damages the plaintiff may have sustained, in an action of *debt*, he can only recover mere nominal damages beyond the penalty.

Tried before Mr. Justice Huger at Charleston, in May term, 1824.

This was an action of debt, for a penalty in a covenant. The defendant had contracted to erect a steam engine for the plaintiff, according to the terms of a sealed instrument of writing under the penalty of \$1,000. The plaintiff alleged a breach in the contract owing to the defectiveness of the work. Much evidence was introduced on the subject of damages. The presiding judge charged the jury that they might, if they considered sufficient proof of the damage had been given, find to the extent of the penalty, *with interest from the date*. The jury having found accordingly, a motion was now made for a new trial on the grounds:

1st. That there was not even sufficient evidence to authorize a verdict to the extent of the penalty.

2nd. That the jury could in no event find the penalty *and interest*.

Grimke, against the motion,—Cited 2 *Dallas* 252. 4 *Days Rep.* 30. 1 *Mass. Rep.* 308.

JOHNSON, J.—There is no foundation for the first grounds of this motion. The proof of a breach of the covenants contained in the agreement, on the part of the defendant and of damages, even beyond the amount of the penalty, is very satisfactory.

2nd. The question, whether the jury could, in any event give a verdict for interest, by way of damages, beyond the penalty contained in the agreement, is concluded by the case of *Bonsal vs. Taylor*, (1 *McCord* 503.) That was an

action on a bond conditioned for the payment of money, and although the report of that case is very concise, the opinion was founded on mature deliberation, and after a careful review of the authorities, and with reference to the practice of our courts; and if in a case of that description, where the damages can be ascertained with mathematical precision, the plaintiff was not entitled to recover beyond the penalty, it would follow for the same reasons, that he was not, in a case where they must for the most part be altogether conjectural. When parties are left free to contract they may make the law of their own contract, and if they stipulate about the damages, the interest, the delay and vexation which would result from the breach necessarily enters into the estimate. It is, indeed, impossible to conceive for what purpose a penalty was designed, unless it were to cover these injuries; and it is the plaintiffs folly or misfortune, if he has not stipulated for enough. The cases opposed to this view have not escaped the view of the court, and it will not be denied that there are some of high authority; but it will be seen that it is fully supported by the current of the English decisions which are collected and digested by Sergeant *Williams*, the very learned annotator of *Saunders' Rep.* and a review of these cases results in the conclusion, that whatever damages the plaintiff may have actually sustained, in an action of *debt*, he can only recover mere nominal damages beyond the penalty; and such has uniformly been the practice of our courts. (1 *Saund.* 58, a note 1. 6 *Term Rep.* 304. 6 *Vesey* 414-5. *Statute 8 and 9. W. iii. ch. 2. s. 8*) The case of *Bonsal and Taylor*, was perhaps the first in which the right to recover more was ever claimed. The motion for a new trial is, therefore, granted, unless the plaintiff remits the interest or damages found by the jury beyond the penalty of \$1000, contained in the covenant.

Pepoon for the motion.

Grimke, contra.

STROBEL vs. LARGE.

In an action of *covenant* on an agreement under seal, the plaintiff may recover damages to the extent sustained without regard to the *penalty*; but in *debt*, only to the amount of the *penalty*. The recovery in either case will be a bar to the other. (a.)

Assumpsit will not lie for the breach of a contract under seal.

Tried before Mr. Justice Bay, at May Term, 1824.

This was a foreign attachment, in *assumpsit* for work and labor, &c. and also on a contract *under seal*, which was set out and declared upon in the declaration, and was founded on the same covenant or sealed contract which was sued upon in the last reported case, between the same parties, in which the jury gave a verdict to the full amount of the *penalty*. The writ was entered in the Sheriff's Office, 30th June, 1817, at 2 o'clock, P. M. and the declaration filed 19th Jan. 1819, being exactly the hour and minute when the other action was commenced, and the declaration filed. It was proposed, on the part of defendant's attorney, that this case should be postponed, until Judge Huger, who tried the former case and who was temporarily absent, should resume his duty as presiding judge; the propriety of which proposal it was urged was made manifest by the fact, that the witnesses, many of whom were the same, testified as to facts and circumstances which were the foundation of the verdict of the jury in the other cause. This proposal was rejected. A motion was then made for a nonsuit, on the inspection of the record, it being manifest that this was an action on an implied *assumpsit*, when there was a special contract under seal and the said contract set out and declared upon. This motion was overruled; and a verdict found for the plaintiff.

A motion was now made for a nonsuit, on the grounds:

1st. That this was an action of *assumpsit* on a contract under seal.

2nd. That the party, having shewn by his declaration, that there was an express contract, could not recover on the

(a.) See on this subject, *Pothier on Obligations*, 804, *Evans' Ed. part 2d, ch. 6, § 1.* and *Evans' note*, 2 vol. 81.

counts for work and labor, materials furnished or money laid out and expended for defendants use; but could recover only on the special contract or not at all.

3rd. That the cause of action in this case, was the same as that in which the same plaintiff had recovered the penalty of the contract with interest.

JOHNSON, J.—This case arises out of the same contract which was tried before, in the case between the same parties, at the present term. By reference to it, it will be seen that the defendant undertook to furnish the machinery and set up a steam saw mill for the plaintiff, and that he was to send on a competent agent for that purpose, and for the faithful performance, each bound himself to the other in the penalty of \$1000. The contract was under seal, and the former was an action of debt for the penalty; and this is an action of assumpsit to recover money expended by the plaintiff in supplying the deficiencies and repairing the defects of the machinery sent on by the defendant in pursuance of the contract. Independent of the written contract, there was no proof of any undertaking on the part of the defendant to refund this amount. The only attempt made to do so, was in showing that some of the materials supplied by plaintiff was done with the knowledge and sanction of the agent sent on by defendant; but there was no proof of any authority given him, except to put up the machinery which had been sent, and could not therefore bind the defendant. And all the grounds of this motion may be resolved into the single question, whether the plaintiff was in this form of action entitled to recover back the money thus advanced by him, if, as was fully proved, the machinery was defective and of no value? There can be no doubt on this question. All the books lay it down as a settled rule that assumpsit will not lie for the breach of a contract under seal, and in this case, there is no proof of any contract, either express or implied, a part from the specialty, and to that the plaintiff must resort for his remedy,

In an action of *covenant* on that agreement, the plaintiff might have recovered to the extent of the damages he had sustained, without regard to the penalty; or in debt he may recover a sum equal to the penalty. The recovery in either case would, however, be a bar to the other.

Motion for nonsuit granted.

Pepoon for the motion.

Holmes, contra.

DAVIS & LEHRE vs. T. GOURDIN.

Defendant leased to plaintiffs Nelson's Ferry, and two hundred acres of land, and covenanted with plaintiffs to furnish one half of the laborers necessary to erect a bridge over a neighboring creek, and to assist in opening a new road to the Ferry. From the nature of the covenant, it was held that the plaintiffs were the actors, and that the defendant was not bound to move in the matter, until he had notice that the plaintiffs were ready to engage in it, nor was he bound to contribute to the expenses until they were incurred, the benefit being more immediate to the plaintiffs.

Tried at Charleston, in May Term, 1824, before Mr. Justice *Huger*.

This was an action of covenant. In October, 1816, an agreement was entered into by Gourdin of the one part, and Davis and Lehre of the other part, whereby Gourdin leased to Davis and Lehre Nelson's ferry and 200 acres of land for 800 dollars per annum. In a second and independent covenant in the same lease, Gourdin agreed to furnish half the labourers necessary to erect a bridge across the Eutaw creek at its entrance into Santee; and farther to aid and assist in opening a road of about two miles from the mouth of the said Eutaw creek; the object being that the said road and bridge be at the joint expense of the two contracting parties. The plaintiffs complained of a breach of this covenant on the part of the defendant.

The pleadings made two questions:

1st. Was there a breach on the part of defendant? and

2nd. If there was, to what extent had the plaintiffs been injured?

It appeared from the evidence, that the bridge and road in question were of considerable importance to Nelson's ferry. The benefit to accrue from them was estimated at from two to three hundred dollars per annum, and the said bridge and road had not been made. The road from Charleston to Nelson's ferry leaves the Congaree road, not many miles from the ferry, and takes a more northerly direction. The road contemplated would run from the ferry, in a south west direction, until it intersected the Congaree road. It is often difficult, and sometimes impossible, to cross the Santee at Nelson's ferry, from freshets. Could travellers return into the Congaree by the route contemplated in the agreement, and not be obliged to retrace their steps on the present road, it was thought certain that many would cross at Nelson's, who are now deterred by the necessity of returning on the present road, should the ferry be difficult or impassable. There appeared to be two or three blind roads running from the mouth of the Eutaw creek towards the Congaree road, sometimes in the direction of the road contemplated. But one, was opened several years since, nearly south, by one of the witnesses, when he lived at the ferry, to facilitate his approach to his summer residence in the pine barren; there was another in a more westerly direction, which was called the neighborhood road. The one which the plaintiff wished opened would have taken a still more westerly direction, and pass through a swamp attached to Williams' creek. This would have effected more completely the object of the parties than any other; as less distance would have been lost by travellers who might be unable to cross at the ferry. There were advantages and disadvantages peculiar to each course. It is thought unnecessary here to state them all. It is however, important to state that the road by Williams' creek would pass over lands said to belong to Samuel Gourdin, the son of defendant, and land belonging, or said to be-

long to one O'Farrell and his heirs. Mr. Davis had directed his overseer to open the road; and he informed Mr. Gourdin, the son, then living on the land, of his instructions, who replied that the road might be opened if they pleased as far as his line, but not beyond it. The son occupied and planted the land from the date of the lease; before that period it had been called the land of his father. On the 1st and 7th of February, 1819, defendant wrote to Davis and proposed to build the bridge across Eutaw creek, if Davis would give 200 dollars, or that he would give Davis 200 dollars if he would build the bridge. He further observed that the road could not be cut without the sanction of the legislature. On the 14th of February, Davis, in a letter to Gourdin, insisted upon having the road and bridge made; this appeared by a copy of the letter transmitted to Lehre in a letter from the defendant on the 7th February, 1819. On the — of — 1819, an act was passed authorizing the road by Williams' creek to be cut. At this time, Davis was a member of the legislature. On the 22nd of July, 1822, the defendant, by his attorneys, Simons and Waring, proposed to Davis to build the bridge and cut the road for 400 dollars, if he would do it. It was stated by two witnesses, on the part of the plaintiffs, that in conversations with defendant, at different times, he said that a road could not be cut without an act of the legislature, and had he known how averse his son was to have the road run through his land, he would not have entered into any agreement about opening it.

The presiding judge charged the jury if the defendant had been guilty of a breach of his covenant, they ought to give full damages; but, he thought, he had not. That by the words and spirit of the covenant, he was to be regarded only as an auxiliary. That Davis was principal, who ought to have called upon defendant to proceed with the work and not defendant upon him. That the agreement was loose; no specified direction for the road to take; and that certainly there was nothing in it which authorized Davis to designate

the direction. That if Gourdin had refused wilfully to do any thing in the matter, he ought to be made to pay.

The jury found a verdict for plaintiffs.

An appeal was now made, on the grounds:

1st. That no breach of covenant, on the part of defendant was proved.

2nd. That the damages were greater than were warranted by any testimony adduced in the cause.

Argued, 18th March 1825.

Hunt, against the motion.—Gourdin putting his son in possession of the land, through which the road was to run was an attempt to take advantage of his own wrong, and the verdict is proper. The question was tried upon its merits, without reference to form. The opening of the road was the consideration of the advance in rent, and the plaintiff was entitled to damages on the covenant.

Dunkin, contra.—The opening the road was a secondary stipulation in the covenant. This same case has been before the court before, and it was held the covenants were mutual and independant. (2 *McCord's Rep.* 514.) Before Davis should have his action on the covenant, he should at least notify Gourdin, that he was ready to commence the road, &c. Paying O'Farrell for the land was a condition precedent, and Davis should have been the agent in doing so. See the act authorizing the road to be made. The verdict should only have been for half the expense of building the bridge and making the road.

JOHNSON, J.—By the covenant, on which this action is brought, the defendant was bound to "furnish one half of the labourers necessary to erect a bridge to be built and erected across the Entaw creek, at the entrance into Santee river; and further to aid and assist in opening a rode about two miles in length from the mouth of the said Entaw creek, into the main Congaree road, leading from Charleston to Columbia. The object being that the said road and bridge be at the joint and equal expense of both the contracting parties;"

and the breaches assigned are, that he would not furnish one half of the labourers necessary to erect the bridge, and that he did not, and would not assist in opening the said road.

The question made by the first ground of the motion is, whether the defendant has broken his covenant? For the purpose of determining the legal question, it would perhaps, only be necessary to state that the bridge has not been erected, nor the road opened by either of the parties. But it does not appear that the defendant was even wanting in good faith. In his letters of the 1st and 17th of February 1819, he offers to the plaintiffs the alternative of giving or taking \$ 200 for building the bridge, and in the latter he objects being himself the active agent in opening the road, until an act of the legislature could be procured; as it passed through the lands of others; and the truth of this fact is proved by the act of the legislature of December, 1819, passed when Davis, one of the plaintiffs, was a member; and the notice of the 22nd July, 1822, contains a proposition to give or to take \$ 200 for building the bridge or opening the road. Nor is there any evidence that the plaintiffs did at any time give the defendant notice that they were ready and prepared to go to work; and the question now is, whether these circumstances in law constitute a breach of the covenant on the part of the defendant? In the interpretation of contracts it is a universal rule that they are to be taken according to the intent of the parties, to be collected from the whole context, and with reference to the subject contracted about. If we look into this contract, it will be seen at once, that the thing to be done was contemplated as an immediate benefit to the plaintiff, and that the benefit to result to the defendant was remote; so that it would be naturally expected that they should become the actors, the first movers in the business; and this is implied from the terms used, "he is to furnish one half of the labourers to erect the bridge," "he is to assist in opening the road." And apparently with a view to put this question beyond doubt, it concludes by saying the object is, that these things shall be

done at the equal expense of the parties. Taking it for granted then, that the plaintiffs were to be the actors, it follows that the defendant was not bound to move in the matter, until he had notice that the plaintiffs were ready to engage in it; nor was he bound to contribute to the expenses, until they had been incurred. The same reasons which would operate to exclude the plaintiffs from becoming the actors in the transaction would operate still more forcibly to divest the defendant of that character, and the result would be, that both must move at the same instant of time. The work is not done, nor did the plaintiffs give the defendant notice that he was prepared to engage in it; as there is no evidence that the conversation of the witness and defendant's son ever came to his knowledge, or was intended for him, until long after it transpired. But there is another view of the question, which is conclusive under the circumstances which this case comes before the court. It is obvious that if the plaintiffs are entitled to recover for the breach, for the same reasons the defendant would also be entitled to his action. Neither has performed the work, and neither has given notice to the other of his readiness and preparation to engage in it. The motion for a new trial is therefore granted.

Dunkin, for the motion.

Hunt, contra.

N. HAYWARD vs. H. MIDDLETON.

A usage, to become law, must be of long standing; general in its operation, and known to, and acquiesced in, by all those whose rights are affected by it, besides being just and reasonable in its operation.

The consignor is liable to the carrier for freight; and the carrier is not bound to look to the consignor's factor for it; and no legal usage or custom to the contrary exists in Charleston.

If the consignee be liable, it does not free the consignor from his liability, as two may be liable for one debt.

Tried before Mr. Justice Colcock, Charleston, May Term, 1823.

This was an action of assumpsit to recover the freight of certain parcels of rice of defendant, carried from his plantation to the city in plaintiff's vessel. The carriage of the rice and the amount of the freight being proved by the testimony of captain Hatch, the master of the plaintiff's vessel, the plaintiff claimed a verdict, which was resisted by the defendant upon the grounds:

1st. That he was not liable to pay the freight of his own rice, by a usage of trade known to exist in Charleston, but that his factor alone was liable.

2nd. That if the testimony should establish that both himself and his factor were liable, he was discharged from this suit, because the plaintiff had elected to apply, in the first instance, to the factor, by which he waived his right to apply to him, the defendant.

The plaintiff, on the other hand, contended that no usage was proved which discharged the planter, and if it had been, it would have been unreasonable. That there was no election here, and by law the consignor was liable for the freight of his goods.

A number of witnesses, factors, were examined, to prove that it was a custom in Charleston for the carrier to look to the factor for freight, and not to the planter. The Reporter thinks it unnecessary to publish this volume of evidence, as the court, in their opinion, repeat such part of the testimony, as was considered material.

The jury found a verdict for the defendant. A motion was now made to set aside the verdict and for a new trial, on the following grounds:

1st. Because the consignor is liable, legally, for the payment of the freight of his goods shipped.

2nd. Because there was no usage proved to be so well established and known as to lead to his exemption from the liability in the present case.

3rd. Because the usage attempted to be proved was unreasonable, unjust, and illegal.

Holmes, against the motion,—Said the consignor is liable for freight by the common law. While in *transitu*, the consignor is liable; but as soon as the consignee takes possession he is liable. (*Lex Mer. Amer.* 203-4. *Davis vs. James, 5 Burr.* 2680,) The consignor is only liable on the special agreement. The carrier, has a lien for freight, and if he delivers the goods to the consignee, the contract is with the consignee for freight.—The usage here was clearly proved, and the jury have found the usage.—Was it such a usage as amounts to a good custom?—To make a good custom, it must have existed time out of mind. (*Vinnius Ins.*) The practice should be the uniform usage of all concerned in the business and should be continued, and be acquiesced in, and be certain, all which requisites have been proved in this case.

As to its being reasonable; he said, unreasonable usage is one contrary to public good, and beneficial only to a few. The factors say this is beneficial to them. Goods would not be delivered till freight was paid. So it was beneficial to the ship owner. They got their freight sooner, and it was easier collected. For if he depended on his lien he might be detained. So it is beneficial to the planter; for he must advance the freight or come to town to pay it, or sacrifice part of his produce.

The public as to this matter, are those who can be affected by it. The justice and injustice of a custom is as to this convenience or inconvenience. Men engaged in commerce were the best judges of what is just and convenient to themselves. Assent of all concerned makes custom. (3 *Salk.* 112.)

From this results the implied agreement to look to the factor alone. An implied contract exists to pay freight and till the goods are delivered, the factor is not a party, nor bound.

The custom either gave the ship-owner an additional security, or substituted one for the other. Can we suppose

this to have been acquiesced in? Not shewn that consignor has ever been made liable? (*Chit. Bills* 85.) The court adapts rules of law to usage of trade. (1 *Exp. Ca.* 115.) Exemption of the consignors so far proved, that he has never been looked to, the same ship owners have lost by the failure of the factor.

COLCOCK, J.—In considering the first ground taken for a new trial in this case, it would seem to be a work of supererogation to do more than refer to the numerous opinions of the court as stated in 1 *Cons. Rep.* 186, where the court have determined that the consignor is liable. But as the counsel for the respondent has undertaken to controvert that opinion and has adduced authorities which are said to be opposed to it, it may not be amiss to shew that the decision of this court is supported by the concurrent opinion of all the elementary writers on the subject, and by the very cases which the counsel has relied on.

The first position taken is, that the consignee is liable; and next, that two cannot be liable.

The first will not be denied. The consignee is often liable; perhaps it may be said in nine cases out of ten; but that does not prove that the consignor is not also liable. The second position can not be supported. Indeed the converse of it is true. In commercial transactions nothing is more common and frequent than that there should be two, three, and sometimes a dozen persons, all of whom are liable. As in a case of a bill of exchange or note endorsed by different persons. Contracts for freight arise in two ways: First by charter party; as where a merchant hires a ship for his sole use, lays her and sends her to a particular port; next by putting the goods on board and taking from the captain a bill of lading, as is the case with those vessels which are called general vessels; that is such as carry goods for all and any person who may put them on board. And when the course of trade is well known, the parties acquainted with each other, and the distance to which the goods are to be sent

is not great, as in the case before us, it is not uncommon to place the goods on board, without any bill of lading; in which case the contract is to be regulated by the well established law on the subject. By receiving the goods, the ship-owner contracts to carry safely and to deliver according to the verbal directions he receives. Now if we resort to just principles, I take it, that no one is better established than, that he who employs another to perform a service for him is liable to pay him a reasonable compensation for his labor. Why should not the rule apply in this case? It is answered, because the goods are liable for freight and the carrier might have paid himself; and again, because when he delivered the goods to the consignees, he made them his agents. Now the amount of this is, that if a man gives up one of his securities, he abandons them all. There is, to be sure, a strict technical rule of that sort which relates to joint obligors, but this is certainly the first time that it ever was attempted to be applied to cases of this kind. When it is conceded that the goods are liable, and that the consignee may become so by receiving the goods, it does not follow that the consignor would be exempt in cases of loss. For who reposes the confidence in the consignee? Not the carrier, for he is directed to deliver the goods to the consignee and undertakes to do so. For the most part, he is a stranger to him. Now it is a well established rule, that if one of two innocent persons must suffer, he who reposes the confidence and thereby has occasioned the loss, must bear it. In *Abbott on Shipping*, 241, the author, when contrasting the opinions of *Valin* and *Pothier*, the former of whom contends that the goods alone ought to be liable for the freight, remarks that "in addition to what *Pothier* says in answer to this, it may be proper to observe that the argument of *Valin* seems to prove too much; for if the goods are to be the only security for the freight, and the merchant ought not to pay the freight, if they are not worth the amount of it, the master and owners must lose the freight, if the goods happen from any accident to come to a bad mar-

ket, which is contrary to all law and reason. And further, that the foundation of the argument does not apply to this country, by the law of which, although the goods are pledged for the freight, yet the merchant also is personally responsible for it."

But it was contended that the usage existed in Charleston, whereby the common law liability of the consignor was shifted to the consignee and on this ground the verdict of the jury was no doubt founded.

Before I proceed to examine the testimony, I lay it down as an established doctrine that an usage to affect this purpose must be of long standing, general in its operation, and known to, and acquiesced in, by all whose rights are affected by it, and also just and reasonable in its operation. Upon an attentive examination of the testimony it will be found to be in fact no more than proof of that liability which the law itself imposes on consignees who receive goods. For without exception, all the witnesses state that they deduct the freight out of the consignors produce, and that the carrier often waits until the produce is sold, though they sometimes pay the freight before it is sold.

As this is a case which has been long depending in our court and has excited some interest, I shall be excused in giving a brief analysis of the evidence.

The first witness, Mr. Simons, says the usage has existed for forty years past, as long as he could recollect, to look to the factor as debtor for the freight. But he adds that he knows of no case in which the captain applied to the planter when the factor became insolvent; nor of any case where the planter settled the freight himself. Now his calling that usage which is law, cannot alter the nature of the responsibility; and if it could produce any such effect, does the proof of a liability in the factor remove that of a planter, above all when he says that he knows of no instance in which the matter has been questioned? Does he not negative all idea of usage, though he may express his own opinion?

Mr. Kershaw, the next witness, says: "when he received produce for sale, he considered himself liable for freight. He never looked to the planters, and has lost freight. He knows of no case of the planters being applied to. He should suppose planters were not liable." Here again is mere opinion, without any case to support it.

Mr. Minott, the next witness, expresses only his own opinion. He knows of no case, and in addition to this, has been only three years a factor.

The next witness, Mr. Gadaden, who was one of the defendants factors, states a very strong opinion on the subject; "The usage was to look to the factor. He did not know an instance to the contrary. He owned several vessels and always debited the factor and lost freight by factors, but never called on the planter." Here it is observed also, the witness gives only his opinion. He, like Mr. Simons, knows of no case in which the planter was called on and refused, or was sued for the freight. He did not call on the planter, because he believed him not liable; but this is mere opinion and not such evidence as is necessary to establish a point of such primary importance.

The next witness, Mr. Mazyck, states that "he knows nothing of such a custom, though he has been in business for twenty nine years. He knows instances of the planters paying freight." This testimony is against the usage.

Mr. White, the next witness says, "the factor is responsible, except in some cases; never knew an instance of the planters being called on for freight. He thinks that if both factor and planter were charged in the account for freight, both would be liable." Here is an opinion founded on the mere fact of making the charge against both, which can certainly have no effect; and in another part of his evidence, he says, "he is not required by the usage of trade to confine his charge against the factor;" which certainly strikes at the usage itself.

The next witness Mr. DeLiesseline, speaks, "of his own usage, as he calls it, which is to look to the factor and not the planter. He has known the captain to complain to the planter that the factor did not pay." He then proves no custom.

I remark then in the first place, that all these witnesses are factors. Mr. White disproves the usage; Mr. Mazyck knows nothing of it; Mr. DeLiesseline confines it to himself; Mr. Mynott has been only three years in business. The proof of the usage then rests on the evidence of Messrs. Simons, Kershaw, and Gadsden; all of whom say, they know of no reasons and give only their opinion. Now if the common law is to be overturned in this way, any eight or ten respectable citizens engaged in the same pursuit, might legislate for a community. Suppose a dozen merchants in this city should say, that it had been an usage with them, as we all know it has been, to charge goods delivered to an executor or administrator, to the estate which they represent, would this court hold, that therefore, they should be permitted to recover judgment which would bind the estates? Or to take the case put by the plaintiff's counsel, suppose they should say that a dormant partner was not liable on the note of the principal of the house, would he, therefore, be exempt? To establish an usage, some instances of an acquiescence in that usage by those whose rights are affected, are indispensably necessary. Now not a single instance has been given of a carrier agreeing to lose his freight by virtue of the usage. Some time ago the common carriers in London attempted to claim a lien on goods for their general balances and endeavored to establish an usage. But what was the language of the judge in those cases; although they proved several instances, and one as old as thirty years, in which it had been done and acquiesced in? Lord *Ellenborough*, said, "It is too much to say that there has been a general acquiescence in this claim of the carrier since 1775, merely because there was a particular instance of it at that time; other instan-

ces were only ten or twelve years back, and some of them of very recent date." Still there were instances. And again, "It must be admitted that this claim is against the general law of the land, and the proof of it is, therefore, to be regarded with jealousy," (7 *East*, 228. *Rushford vs. Hadfield*.) I have said that the usage must be just and reasonable, and this, in its general operation. Now this practice is very convenient to the factors, and as to them, it is also just and reasonable, for they receive out of the produce what they pay; and when they speak of having lost freight, it must be understood that they have lost it when acting as agents for ship-owners, or as ship-owners; which is only proof of the operations of their own opinions as to themselves. But can it be considered as just in relation to the carrier? The foundation of the claim to exemption on the part of the consignor is, that the goods are liable for freight as well as the consignee when he receives them. But when we consider the nature of the business of the carrier and his undertaking, which is to deliver the goods to the consignee, it is perceived he is obliged at last to trust the consignee. Does it comport with the nature of his occupation to be selling out so much of the cargo as will pay the freight, or to lay in port until the consignee can sell? If he were obliged to do so, that which was intended as a benefit, would, in most cases, prove an injury. When it is said, therefore, that these means of payment are offered him no more is meant than that he may under circumstances resort to them. But if they fail, then the original obligation of the consignor attaches, and from him, compensation may be received. If one should contract a debt with the owner of a livery stable for the keeping of his horse and on riding him out he should die, would it not be unjust that the one should refuse to pay for the keeping of his horse, on the ground that the other had a right to detain him until he was paid, and that he had parted with his lien? I refer now to the cases relied on by the counsel for the respondent. The first is the case of

(*Davis vs. James*,) an action against a common carrier by the consignor, (*Burrows* 2680,) to which it was objected that having parted with his goods, he could not maintain the action, but the action should have been brought in the name of the consignee; to which Lord Mansfield said, "There was neither law nor conscience in the objection. The vesting of the property may differ according to the circumstances of cases; but it does not enter into the present question. This is an action between the plaintiff and the carrier. The plaintiff was to pay him; therefore, the action is properly brought," &c. Now, this does not prove that the consignor is not liable for the freight; for in this statement of the case, it is said he actually paid the freight. The next was the case of *Moore and others vs. Wilson*, (1 Term. R. 659.) This was also an action against a common carrier for not carrying the goods safely. The declaration stated that the defendant undertook to carry the goods, "for a certain hire and reward to be paid by the plaintiffs." It was proved at the trial, that Clark, the consignee, had agreed with the plaintiffs to pay the carriage of the goods, which the defendant's counsel contended did not prove the declaration, and Buller, Justice, before whom the cause was tried at Guildhall, being of that opinion, nonsuited the plaintiffs. But on a rule to shew cause why the nonsuit should not be set aside, Buller, said, "that on considering the question he found that he had been mistaken in point of law; for that whatever might be the contract between the vendor and the vendee, the agreement for the carriage was between the carrier and the vendor, the latter of whom was by law liable;" and the other judges concurred. Now this case, so far from impugning the decision of this court, is directly in point to support it. (a.) To these I add the only case in which it was ever doubted, as far as my present investigation and research enable me to decide, that

(a.) See this same case, heretofore before the court. (1 Const. Rep. 186, 2 Noll and M^c Cord 9.

the consignor was liable for freight when that was the direct question in the case. It shews not only what the law is in that point, but also that that which is called usage, is established law. The case is that of *Pemrose et. al. vs. Milkes*, tried before Lord *Kenyon* in 1790. It was an action for freight on a charter party, by which the goods were to be delivered in London, agreeably to the bills of lading, to a third person on his paying freight. They were delivered to him and he refused to pay the freight, because the merchant, the defendant, who was the consignor was indebted to him to a greater amount. Lord *Kenyon* held that the freight could not be recovered of the consignee; because the master ought not by the terms of the contract to have delivered the goods without receiving the freight from the consignee. But this opinion of his lordship was overruled in the King's Bench, and a new trial ordered, at which the plaintiff succeeded. If a consignee receive goods in pursuance of the usual bill of lading, by which it is expressed that he is to pay freight, he, by such receipt, makes himself debtor for the freight and may be sued for it. (*Abbott 277.*)

Upon the whole then, no usage having been proved, and the law being well established that the consignor is liable, the motion is granted.

Ford and DeSaussure, for the motion.

Holmes, contra.

R. I. TURNBULL vs. WILLIAM RIVERS.

In order to presume a grant of a way, uninterrupted use for at least twenty years is necessary, and the identity of the road must be established, and an acquiescence shewn on the part of the owner of the land.

The necessity from which a person derives a right of way, is when one person sells to another lands inclosed on all sides by his other lands, there the law imposes an obligation on the seller to allow the purchaser a way over his adjacent lands.

The inconvenience of going always to one's plantation by water, will not amount to such a necessity, as will give a way; for necessity and not inconvenience gives the way.

Where the plaintiff was permitted to pass over the unenclosed lands of the defendant, as all the rest of the neighbors, and the way changed with

every change of the fields and fences, at the will of the owner, he cannot claim such way by prescription.

It *seems*, if a person owns land lying between two roads, one on the east and one on the west, and shall sell that lying on the west, it gives to the purchaser no right of way across the seller's land, to the road bounding him on the east, whatever may be the distance or difficulty of getting to that road.

So; it *seems*, if a person should sell to another the extreme point of a neck or tongue of land, surrounded by an open sea, or navigable stream, except on one side, the fact of its being sometimes more convenient to the purchaser to pass through the vendor's land, than to go by water, will not give him a right of way; and the case is much stronger when it is not between vendor and vendee.

The court will grant a new trial *toties quoties* where the verdict is contrary to law; and when there is no evidence on which the jury can found their verdict, and the case is brought before the court, in such a shape that it can put an end to unprofitable litigation by a nonsuit, it will be granted.

Trespass for obstructing a way.

Tried before his Honor Judge *Richardson*, in January Term, 1824.

This was an action of trespass for obstructing a way claimed by the plaintiff to his island, called Goat island, over the defendant's land, called Stent's point. It was proved that there was no land passage to Goat island, except across some part of defendant's plantation, and this action was for a right of way through his plantation. A vast number of witnesses were examined on both sides, and the evidence contradictory; however, the Reporter considers it only necessary to publish such parts of the case as presented legal points on the very important doctrine of prescription. After the evidence closed, the plaintiff's counsel contended that a grant of way in the owners of Goat island was to be presumed from Long island being an old settlement; that the convenience of the way proved there was a grant of it; that W. Lawton proved there was a beaten path which was used five years before 1776; that indeed the Savannah road continues to Goat island, though they disclaimed the right to a cartway; and finally, that it was to be presumed that the grantee of Goat island was also the grantee of Stent's point, and when he granted out Stent's point, he reserved the right

of way *ex necessitate* from his Goat island place, through Stent's point, and that non user for for 20 years did not destroy a grant of a right of way.

To these arguments, the defendant's counsel replied, that no prescription in favor of Long island could benefit Goat island; that if convenience could raise a presumption of a right of way, inconvenience could destroy it, and this was more inconvenient to defendant than convenient to plaintiff. It was denied that Lawton proved any path appertaining to Goat island; he spoke of Long island; that if the Savannah road was the one claimed, it was a public road; and therefore plaintiff must fail in his suit, as he could not claim a private right of way over a public road, (*Co. Litt.* 56, 1 *Esp. R.* 148;) that all the presumptions about the owner of Goat island also owning Stent's point were baseless and fanciful, and if true, the consequences did not follow *ex necessitate*. That the plaintiff must fail in this case, on the ground of necessity, under the decision of *Lawton and Rivers*, (2 *B. & C.* 447;) for the way by water was just the length of the way by land; that there was no proof or presumption of a grant, and the ground of prescription failed, because there was no adverse use proved to be continued, and uninterrupted for above twenty years, according to the doctrine established in the same case; nor was the road identified, but was here *hodie*, and there *cras*.

The judge charged the jury, that his directions to them would be better given by reading the decision of the Constitutional court in the case of *Lawton and Rivers*, than by any other charge; as that case shews the nature of the necessity to be proved by a plaintiff, and also the requisites of prescription. That as to the proof of identity, he left it to the jury, but stated that in his opinion even the *termini* need not be preserved, and yet the same road might exist, if the thoroughfare were one and the same and such a continued use of the same general course and road as to keep up the idea of a grant. He told them that there was testimony to raise a presumption of a prescription in Littlejohn for a way

to Long Island, but that it had nothing to do with the case, and the jury should not regard it; that it would be immaterial to plaintiff even if Littlejohn could prove it, as plaintiff was not connected with him.

The jury found for the plaintiff a cart way on the line between Mrs. Stent's and Mallory Rivers,' and damages enough to carry costs.

A motion was now made to set aside the verdict and for leave to enter a nonsuit, or if that be refused, for a new trial, upon the following grounds:

1st. Because, as the plaintiff, by his declaration claimed a cart way, and no cart way whatever was proved to have existed at any time over any part of defendants land, a nonsuit should be granted.

2nd. Because, if such a way ever existed, the *terminus a quo* was not ascertained or proved, and, therefore a nonsuit should be granted.

3rd. Because no verdict for the plaintiff could have been legally found on the right of way by necessity; neither should it have been left to the jury on that ground; for it was proved that the access by land and water, other than over the way claimed, was at all times as short, and when the tide was high, was shorter than any passage over the defendants land; and, therefore, under the decision of *Lawton and Rivers*, (2 *M^c Cord*,) no necessity could exist.

4th. Because there was no circumstance in the case which could authorize the presumption of a grant of the way from the owners of Stent's point to the owners of Goat island.

5th. Because there was no prescription proved in the owner of Goat island from continued and uninterrupted use; nor was the way claimed identified by any definite limits, nor was the use thereof, if any existed, exclusively in plaintiff or his predecessor, or adverse to the defendant, or to those through whom he claimed.

6th. Because his honor stated to the jury that he did not think it necessary that even the *termini* of the way claimed

should be proved to have been preserved, in order to establish the existence of the way prescribed for.

7th. Because the said verdict was contrary to law, evidence, and the charge of the presiding Judge.

Argued, 22nd February, 1825.

Prioleau, for the motion,—Had hoped that the case of *Lawton and Rivers*, would have settled this. It is essential to prove the prescriptive right as claimed. (*Rotheram vs. Green*, *Noy* 67: S. C. cited in 1 *Camp. Rep.* 315—note.) The plaintiff has prescribed for a cart way. Unless twenty years use be proved he should have been nonsuited. The proof is, that one witness once saw a cart going that way. *Lawton's* foot path is not more than a foot wide. There was not a shadow of testimony. One of the counsel disclaimed.

The *terminus a quo* has not been proved. No witness can tell where it commenced, which should have been done. (*Albon vs. Brounsal*, *Yelv.* 164 and note.) The terminations of a road prescribed for must be proved. He must shew *a quo loco ad quem locum*, and the road should be constant, not one place *hodie*, another *cras*. A nonsuit ought to be granted.

In 2 *M^cCord*, 445, *Lawton and Rivers* was a case regarding the same way, and that case shews there must be an actual necessity. The road being direct from *Turnbull's* to *Dixon's* island landing, did not create an actual necessity. Here no grant is shewn.

As to prescription, use must be continued at least 20 years and must be of the same way and must be adverse, and must be of the same way without variation. The testimony is clear that it continually varied. Adverse possession is negatived by the testimony. It always went by *Mrs. Stent's* permission.

Hunt, contra.—The jury have decided on facts. The judge charged the jury correctly. Whether the road was used, continued, or obliterated, were matters of fact. To set aside a verdict for wrong finding, it must be so wrong as

to warrant a belief that the jury were influenced by corruption, or obstinacy and ignorance, bordering on it. From Stent's point they cross a similar marsh to get to the main of James island. It may be presumed that the same person owned all. Superior convenience strengthens presumption. The proof of a road to Long island, shews a road to Goat Island, an intermediate point. Goat island, a small place, could not afford frequent acts of user. The proof of a cart once passing, may with other facts, raise a presumption of further user. The making a gate and road suitable to a cart, for use in a single instance, is a strong presumption. Here is great necessity in this case. The property has been shewn to be utterly valueless without this road. By water it is a difficult passage of several miles.

Grimke, same side.—Cases similar in principles may differ in facts. In the case of *Lawton vs. Rivers*, there was as near a way by water as by land. Both residence and plantation were on the same high way. In this case to go by water is two or three times the distance by land. In that case the plaintiff was obliged to go part of the distance by water. Presumption is that both places here were granted together; if so, the original owner had the right of way, and reserved it when he sold Stent's point. Evidence that traces of a way were plainer some years since. The contradictory testimony here is peculiarly for a jury.

It is said the jury found a cart way from no evidence but the passage of a single cart; but other circumstances were proved; as making gate and causeway. The judge laid down the law correctly. It is said the *terminus a quo* is not proved. It is the Savannah road, not a particular point on that road. It is not necessary to pursue always the same precise line. Identity of the use determines the identity of the road. It may be easy, to effect the same purpose; viz, to get from the Savannah road to Goat island. The witnesses say they had rather give up the island than use it without this road. Here

was practical necessity. No other practically convenient method of getting there.

The authorities quoted do not apply to the present case. The ways were defined with precision there, here it must be necessarily varying in some degree. It has been sufficiently identified in this case. Occasional deviations will not destroy the identity:

Petigru, Attorney General in reply,—Said there were three modes of getting a road, and it is questionable whether there is not a fourth—by the verdict of a jury. It is not a matter for the jury to judge of the necessity. Doubted whether the jury can find a right of way from a self created necessity. Can one by purchasing part of A's land acquire a right of way over B's; a right which A did not possess? (1 *Saund.* 323, n. 6.) Is the rule recommended by expediency? Does the law give a right to one to take from another's land, because he adds much to the value of his own? Because it will be a matter of convenience to cultivate Goat island, and make five bags of cotton, does it authorize him to commit a trespass? The necessity originates when he wants to cultivate. As to the presumption of a grant, has it been proved by presumption? The presumption is assumed that all was owned by the same person. (2 *Evans' Pothier*, 340. *Willes* 76.) Presumption is nothing, when it is in the party's power to give positive proof. Must not give secondary proof, when better can be had. It is substituting possibility for proof.

As to prescription, put it on the ground that possession gives a right to the land itself, and will do so to the accessories, (3 *T. R.* 159.) yet in analogy to the statute of limitations, possession must be constant and certain, as well as adverse. The user should be of such a nature as to imply a constant claim of right on one part, and acquiescence on the other. All the witnesses say every body went that way, as often as Turnbull and those under whom he claims; all the world have the same right. Here the grant is presumed from user, but they first presume user and then the grant. Is the

presumption of a grant more favored than the grant itself. That, if relied on, must be proved. Proof of user here has been user by other persons, except in some slight instances. It has been rather proof of a public than a private way. (*Com. Dig. Tit. Chemin, 25 and 57.*) If any thing was proved, it was the right of jumping fences. Like a prescriptive right of sporting. (*Evans' Potheir 240.*) Necessity should be confined to the case of persons granting lands and is supposed to grant the right of way with it.

NOTT, J.—The law in relation to cases of this sort is so fully laid down in the case of *Lawton and Rivers*, (2 *M^c Cord 435,*) that it will be sufficient to refer to that case for the general principles by which this must be governed. The court are satisfied that the plaintiff was not entitled to recover either on the ground of a grant or prescription. No grant was produced; no evidence of the existence of one could be inferred. In order to presume a grant, uninterrupted use for at least twenty years, was necessary. And the identity of the road should have been established. But no such evidence was adduced. The island had been cultivated before the revolution; but by whom or by what authority or for what length of time, did not appear. Littlejohn planted it one year by mistake about twenty years ago, and then abandoned it. After him, but in what year, it is not ascertained, one Gibbs planted it, as the overseer of Stanyard. Whether he stayed more than one year is quite uncertain. And that is all the occupation that was proved of the Island, until the year 1810, when it was purchased by the plaintiff. I cannot discover, from the report of the presiding judge, at what time the plaintiff entered into possession; nor does it appear that he cultivated it more than one year. It is, however, unimportant. For it was not long before the defendant enclosed the land and shut up the way, which was the obstruction for which this action was brought. But all the testimony, relative to the occupation of the island, is unimportant evidence of the use of the road; and admitting

the use to have been coextensive with the occupation of the island, it would not give to the plaintiff a prescriptive right; much less is he authorized to set up any such right from the evidence offered on this occasion. It amounts to no more than this, viz: The several occupants of the island were permitted to pass over the unenclosed lands of the defendant, in the same manner and to the same extent as all the rest of the neighbors; and the way was changed with every change of the fields and fences according to the arbitrary will of the owners of the land. Allowing the use of the way appears to have been a mere act of courtesy; and there was no such identity of way proved, no such continued use by the plaintiff, or those under whom he claimed, nor such acquiescence on the part of the defendant as could be construed into a right. The whole case then resolves itself into the question whether the plaintiff is entitled to a right of way from necessity? The necessity by which a person derives a right of way, is when one person sells to another lands inclosed on all sides by other lands. Here the law imposes an obligation on the seller to allow the purchaser a right of way over his adjacent land. (*Perman vs. Wead*, 2 Mass. Rep. 203. 6 *Jacob's Law D. Tit. Way. Howten vs. Frearson*, 3 T. R. 50. 1 *Saunders* 323, *Pomfret vs. Ricroft*.) This is also said to be a right by grant, because the law implies a tacit consent on the part of the seller that the purchaser shall have free ingress and egress to and from the land so situated. But there is no evidence that Goat Island was ever owned by the owners of Stent's point; nor am I aware that it would strengthen the plaintiff's claim if the fact were so. The right in such case must arise from necessity. If, therefore, a person owns land lying between two roads, one on the east and the other on the west, and shall sell that lying on the west, it gives to the purchaser no right of way across his land to the road bounding him on the east, whatever may be the distance or the difficulty of getting to that road. Such a way might be convenient, but there would be no such necessity as would impose upon the owner

of the land an obligation to afford him such an accommodation. In analogy with that case, suppose one person should sell to another the extreme point of a neck or tongue of land surrounded by an open sea or navigable streams, except on one side, would it be understood that the seller should allow him a right of way through the whole neck of land, because it might sometimes be more convenient for him to go to his farm by land than by water? I should apprehend not. Much less would he have a right to demand such a privilege from the owners of the adjacent land who were not parties to the contract. To bring the case more distinctly under our view, let us suppose James Island to be the tongue of land now spoken of, a person residing in Charleston, at Haddril's Point, or on Sullivan's Island, would never expect a right of way to the main land on the west, through all the intervening plantations, merely because his farm was inaccessible by land in any other direction. The inconvenience of going always by water to his farm would not amount to such a necessity as would entitle him to such a privilege. If under those circumstances, he would not be entitled to such a favor, could he entitle himself to it by purchasing another farm on the west end of the island? A direct intercourse between the two places, so situated, would be vastly convenient; but that convenience would confer, no right. Now that is the case immediately under our consideration. Goat Island is accessible by water in every direction, except on the side from which the plaintiff claims a right of way. It is nothing more, therefore, than a matter of convenience, and not of necessity. And if the plaintiff were situated in any other direction from the Island, perhaps he would hardly consider such a way as a convenience. This way then becomes important to him merely on account of the relative situation of the two places and comes precisely within the principle of a necessity created by the party himself which can furnish no ground of right. (1 *Saunders* §23. n. 6.)

There is no evidence, therefore, which could entitle the plaintiff to a verdict on either ground.

It only remains, then to be determined, whether the court shall grant a nonsuit or new trial? It is not conceived that the trial by jury is of so little value as the counsel for the defendant seems to imagine. It is one of the greatest privileges which a free people can enjoy, and independent of its real and intrinsic value, it derives additional importance from the inestimable value which the people themselves imagine it possesses. The court feel no disposition, therefore, to intrench upon the right of the jury; and if there were any evidence which could be submitted to their consideration, a new trial would be granted. But it is equally the duty of the court to preserve the bounds of jurisdiction between the court and jury; and it would be as much an usurpation in the jury to undertake the exposition of the law as of the court to take from them the trial of the fact. Wherever, therefore, there is any conflicting evidence, a new trial will be granted. But when every point submitted is a conclusion of law which it belongs exclusively to the court to make, and where it appears manifest that better evidence cannot be obtained, it would be tantalizing the parties to send them back for another trial. It was a maxim of the civil law that that is the worst of slavery where the law is either vague or uncertain. And it is equally true in this country. The court will, therefore, grant a new trial *toties quoties* where the verdict is contrary to law; and when there is no evidence on which the jury can find a verdict, and the case is brought before the court in such a shape that it can put an end to unprofitable litigation by a nonsuit, that course ought to be pursued.

In this case there was not a *scintilla* of evidence to authorize a verdict for the plaintiff. A nonsuit ought to have been granted in the court below, and is, therefore, now ordered by this court.

Prioleau, and *Petigru* for appellants.

Grimke and *Hunt*, contra.

The Representatives of BOURDEAUX ads. the Treasurers.

Where the plaintiff obtained judgment on a bond secured by mortgage and upon suggestion, obtained an order for the sale of the premises, under the act of 1791, and the premises were sold, the court, after the sale, granted leave to the plaintiff, to state in his suggestion, that intermediate judgments had been obtained against the defendant, since execution of the mortgage and plaintiffs judgment, which he had omitted, in his suggestion.

A third person, because he claims the land sold, has no right to come into court to set aside the judgment, on account of defect in form.

Irregularities, such as are amendable by the court, consist either in omitting to do something that is necessary for the due and orderly conducting of a suit, or in doing it in an unseasonable time, or improper manner.

An execution can be amended after a sale has been made under it of lands, the usual words of authority to the sheriff having been omitted.

But the court will be more circumspect in amending after judgment than before, but the power is as ample in the one case as the other.

Tried at Barnwell in the Fall Term, 1824, before Mr. Justice Richardson.

The plaintiffs in this case had obtained a judgment against the defendants, on a bond which was secured by mortgage. After obtaining the judgment they filed a suggestion to obtain sale of the mortgaged premises, and obtained judgment by default on the ——— day of ——— 1815. The suggestion did not state that judgments had been obtained against the defendants *subsequently to the execution of the mortgage and before the obtaining of the plaintiff's judgment* on their bond; but a sale of the mortgaged premises was ordered on a credit of ———. At this term, Thomas T. Willison showed to the court by affidavit, that at the time of filing the suggestion and obtaining the order for the sale, of the mortgaged premises, he occupied the premises claiming the same as owner, and that he had no notice of the proceedings until after the sale was made; and that suit had been brought against him to try title to the premises by the person who purchased the same under the order for sale; and thereupon moved the court to arrest the judgment for the sale of the mortgaged premises and to set aside the proceedings, as

defective, on the grounds that the suggestion did not state intermediate judgments to have been obtained against Bourdeaux or his representatives, and that the land was ordered to be sold on a credit which the law did not authorize (a.) The presiding judge thought the proceedings defective, and inclined to grant the motion; but a motion being made to amend the suggestion, upon hearing argument, he granted leave to amend, and refused to order the proceedings to be set aside.

Willison appealed from the decision of the presiding judge and moved to reverse the same and to set aside the proceedings, on the grounds:

1st. That leave to amend ought not to have been granted, the proceedings being utterly defective and void, and there being nothing by which an amendment could be legally made.

2nd. That if the suggestion was amendable, the order to set aside the judgment should still have been granted, and the said Thomas T. Willison allowed to plead to, and defend the said suggestion.

Argued 23rd February, 1825.

Harper, for the motion.—The court derives its authority to foreclose mortgages from the act of 1791, (1 *Faust Pub. Laws* 63.) Where a statute authorizes a particular mode of proceeding, that must be pursued, and if it is not, the proceedings are defective and void. *King vs. Horne*, (4 *Term Rep.* 349; *Goodwyn vs. Parry, Do.* 577.) An irregu-

(a.) That part of the act of 1791, giving the law court the power to foreclose mortgages, applicable to this case, is in the following words:—"That on judgment being obtained in the court of common pleas on any bond, note or debt, secured by mortgage of real estate, it shall and may be lawful for the judges of the court of common pleas, in case of any judgment having been obtained subsequent to the property being mortgaged, and prior to the obtaining judgment hereby allowed to be commenced, to order the sale of the mortgaged property for the satisfaction of the monies secured by the said mortgage," &c. With a power to postpone the sale for six months, after the order, and to give a reasonable credit on the sale, not exceeding twelve months. (1 *Faust's Pub. Laws*, 64.)

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larity may be amended, but when the proceedings are entirely defective, they cannot be amended. (*Tidd*. 485, 661; *Newnham vs. Law*, 5 *Term Rep.* 557. *Maddick vs. Hammel*, 7 *Do.* 51. 1 *Bacon Ab. Tit. Amendment*, D. 4.)

Martin, contra.—In the first place, the application came too late. See *Mooney vs. Welsh*, (1 *Const. Rep.* 34.) In the second place, the applicant is a stranger to the proceedings. (*Thompson vs. Caldwell*, 2 *McCord* 390. *Barkley vs. Scriven*, 1 *Nott & McCord*, 408. *Ib.* 11.) And

In the third place the act prescribes no form; but the 43rd and 44th rules of court do, and they have been complied with.

COLCOCK, J.—In considering the first ground in the brief, it is as important, in the first place, to determine on the technical character of the omission in the proceeding which has been amended. By the counsel for the appellant, it is called a defect; such a defect as vitiates the proceeding and is not amendable; while on the other hand it is contended by counsel for the appellee, that it is mere irregularity. In *Tidd's Practice* 434, it is said, an irregularity may be defined to be the want of adherence to some prescribed rule or mode of proceeding; and consists either in omitting to do something, that is necessary for the due and orderly conducting of a suit, or in doing it in an unseasonable time or improper manner. Now, according to this definition, the omission in the suggestion must be considered as a mere irregularity. It was at most an omission to insert the words that "other intermediate judgments had been obtained." When we advert to the doctrine of amendments, and the cases which have been decided on that subject, it will be perceived that the object of the whole system is to provide a remedy for the casual omissions or negligence of the different officers of court; in a word, to enable the party to do that which the law and facts of the case would have authorized, or did require the officers to have done. The decisions on this subject are so numerous, and amendments so common, and I may almost say

unlimited, that the difficulty is in selecting such cases as seem most directly to apply to the case before us. In the case of *Porteous vs Givens*, (2 *McCord* 49,) the court allowed an amendment in the damages laid in the declaration, from ten to one thousand dollars, to adapt it to the finding of the jury. And in the case of *Purkey and Toomer*, a) the court were all of opinion that an execution could be amended after a sale had been made under it of lands, when there was no express authority to the sheriff to levy on the lands, the usual words having been omitted. It is true, as urged by the appellant's counsel, that the court will be more circumspect in allowing amendments after judgment, than before. The power of the court, however, is as ample in the one case as in the other. By the 9th Henry V. c. 4. and the 8th Henry VI. c. 12, they are empowered to examine and amend what they shall think, in their discretion to be the misprision of their clerks in any record, &c. &c. and the 8th Henry VI. c. 15, extends this to clerks and other officers. Now, what is asked of the court? To insert some words which it is admitted may have been inserted at the time in the suggestion, and which it is contended by the appellant's counsel are necessary, as being required by the 43rd rule of the court, and the act of 1791, on the subject of foreclosing mortgages. It is admitted that all the other necessary facts were stated in the suggestion, and that intermediate judgments had been obtained and were of record in that court. There was then enough to apprise the defendant of the object which the plaintiff had in view. The suggestion concludes with a prayer that the court would order a sale of the mortgaged premises; to which the defendant, if he had thought proper may have pleaded. He then must have considered it as a mere irregularity which he waived.

But it was further considered, that if the proceedings were amendable, that the motion ought not to be granted, because there was nothing by which to amend. The judgments being no part of the record. It is said that in compli-

(a) 1 *Const. Rep.* 323.

ance with the rule on this point, the original writ or bill is amendable by the instructions given to the officer; the declaration, by the bill; the pleading subsequent to declaration, by the paper, book, or draft, under counsel's hand; the nisi prius roll, by the plea roll; the verdict, whether general or special, by the notes of the counsel, or even by the affidavit of what was proved on the trial; the judgment by the verdict; and the writ of execution by the judgment, or by the award of it on the roll. (*Tidd's Practice* 262.) From which it is obvious that a proceeding may be amended by that which is no part of it, even by the frail memory of man. If so, it is certainly competent to amend this suggestion by the judgments of record in the court. Indeed, it is difficult to say in what cases amendments may not be made. The counsel for the appellant in referring to those cases, in which the defect was considered so great as to preclude amendment and authorize the court to set aside the proceeding, stated, as one, the case of an action against an executor, charging him in the *debet et detinet* both. Yet in the case of *Richards vs. Brown*, (*Douglas* 46,) and in the case of *Short and Coffin*, (*Burrows* 2730) it was held that a judgment may be amended by changing it from *de bonis propriis* to *de bonis testatoris*, &c. &c. which changed the liability of the defendant entirely. If this can be done, it is not easy to perceive any reason why in the case quoted, the court may not have amended by striking out that part of the proceeding which charged the executor in the *debet*.

On the 2nd ground I know of no power which the court below possesses to admit Mr. Willison to become a party to the suggestion, either at the time of making the application, or any other. But if he could be admitted to come in, it certainly would be under some stronger claims to the aid of the court than any which he has as yet exhibited. To entitle himself to relief he must first shew that he had been injured, and that the aid of the court was indispensably necessary to relieve him. Now, in what does he found a claim even to be heard by the court? That he was on the land and

claimed. I would ask, if that might not be urged by every *squatter* in the country? He is a stranger to the proceeding and his application might well have been rejected on that ground. The motion is dismissed.

Harper and Patterson for the motion.

Martin, contra.

A. TALVANDE vs. O. CRIPPS, et. al.

Upon demurrer, notwithstanding the defects of the pleading demurred to, the court will give judgment against the party whose pleading was first defective in substance.

If tenants in common join or are joined in a suit, as avowry for rent, they must plead jointly; but if each proceeds for his own, each must avow for himself.

In an avowry for double rent, under the act of 1808, the avowry need not state that three months in writing to quit, was served on the tenant, where the tenant himself gave such notice of his intention to quit.

Under the act of 1808, the demand in writing to be made, for surrender of possession by the tenant three months afterwards, need not be made by all the tenants in common, but it is sufficient if made by one tenant in common, requiring delivery of possession to him, for himself and co-tenants.

After verdict, upon an avowry for double rent, a demand before the distress will be presumed. But when the tenant himself gives notice of his intention to quit, a demand may be made after distress; and *quare*, if any demand is necessary.

The law allowing a landlord to distrain for double rent, where the tenant holds over after notice to quit, is not unconstitutional; for by the continuance of the tenant he makes it his contract.

When the jury find for a defendant on all the issues made, a general verdict is good.

Action of Replevin.

Tried before his Honor Judge *Huger*, Charleston, May Term, 1821.

The plaintiff had occupied a house belonging to the defendants, for the rent of which they distrained. The plaintiff replevied and the defendants avowed and contended that they were entitled to double rent, under the act of 1808, as plaintiff held over after notice to quit had been given.

A note from the plaintiff was produced, dated March 23rd, 1818, in which he gives the defendants notice that he would quit at the end of the year. On the 2nd of June following, he addressed them another note, stating that he must hold over. On the 29th of June, 1818, the plaintiff was informed, through Mr. Abbott, that he must quit the house, and if he held over, he must pay \$ 2,600, payable quarterly; a copy of this notice and demand was produced. At the expiration of the quarter, \$650, the sum for which the warrant issued, was demanded, which he refused to pay, but said he was ready to pay the half of that sum; but he did not tender it. The warrant was signed by O. Cripps, and Talvande was in the house at the time the demand was made, which was, as the witness (Abbott) thought, about October 1818.

Mr. Ball stated that he had agreed with Mr. Cripps to take the house from the 1st June, 1818, at \$ 1300 per annum. Before he made the agreement he visited the house and examined it. Mrs. Talvande was at home, and in the house at the time, and must have known his object. He afterwards agreed to purchase the house, and was to give \$ 20,000 for it. He did not purchase, in consequence of plaintiff refusing to give it up. He understood that the property belonged to the children of the late Mr. Cripps, and that a sale had been ordered by the court of equity. It was admitted that the avowants were the children of the late Mr. Cripps. Mr. Hunt, the commissioner in equity, stated that the house was ordered to be sold by the court of equity; that he had not been consulted by Mr. Cripps about renting it, but that the plaintiff had offered to pay him the rent, which he refused to take, saying he had only authority to sell. The decretal order of the court was dated 25th November, 1816. He had never been in actual possession of the house, but had advertised it for sale. Mr. Cripps had indeed mentioned to the witness that he had rented it to the plaintiff, and he, the witness, had not objected to it.

Here the evidence closed, when the plaintiff's counsel moved to have judgment entered up for the plaintiff, as the avowants had not shewn that any rent had been reserved.

The motion was refused.

It was contended on the part of the avowants, that the plaintiff's letters proved that the first year ended on the 1st June 1818; and that in October following, he offered to pay for a quarter due, the half of \$ 650, which was sufficient to shew that the rent was reserved.

2nd That the authority of Octavius Cripps could not be disputed by the plaintiff, who was his tenant, and that it was not necessary to produce a power of attorney from the co-heirs.

It was contended on the part of the plaintiff, that the act of 1808, so far as it declares that a tenant holding over shall forfeit double the value of the use of the premises was unconstitutional, and therefore void; and the case of *Allen* and the *Treasurers* was relied upon in support of the position. That Octavius Cripps had no authority to issue the warrant; that the suit had abated by the death of Octavius Cripps; that they had distrained for double the rent, and not for double the value of the use of the house.

His honor told the jury that the evidence was sufficient to shew that the first year ceased on the first of June, and that on that day a new quarter had commenced. That the offer of the plaintiff to pay in October \$ 325 for an unexpired quarter, was sufficient to shew that so much rent had been paid per quarter before the 1st June. That he did not regard the act of 1808 as unconstitutional; as prior to the act, the power to distrain existed, and the act only altered the measure of damages.

A verdict was rendered for the avowants for \$ —.

The plaintiffs appealed on the grounds:

1st. Because the act of 1808 is unconstitutional, so far as it authorizes a distress for double the annual value of the

less than the penalty. By the 1st clause of the act of 1808, where the landlord gives the notice, as was the case here, the penalty is double the value, and the record states the value at \$ 1300, which should have been the criterion of the verdict. The verdict should have been for \$ ———, the value of one quarter and the judgment should have been for double. (4 *Cranch* 299)

The verdict as to the bailiff, Solomon Moses, is informal. Each issue should have been found distinctly.

As to new trial, the first question is, whether the remedy by distress, or any summary remedy for the penalty, is constitutional? (2 *McCord* 55. 1 *Bay* 382. 2 *Haywood* 329.) In the case provided for by the act, the relation of landlord and tenant has ceased, and the double rent can only be considered as a naked penalty upon a trespasser. The objections to give the party interested the power to enforce it, greater than to lodge the power any where else.

2nd question, as to the evidence. The notice to quit produced in evidence does not correspond with the one contained in the avowry. The one requiring \$ 2,600 per quarter, and the other 2,600 to be paid quarterly. The distress warrant is for single rent, and the avowry for double rent. The distress warrant is signed by Octavius Cripps, for himself, and as administrator and agent for the heirs.

Petigru, Attorney General contra.—Some defects are cured by verdict which would be fatal on demurrer. (*Com. Dig. Pleader*, S. 47.) The reason of the rule that tenants in common must avow separately, does not apply to this case. (*Gilb. Law Replevin* 146.) This was a joint contract made by the avowants with the plaintiff, through their agent O. Cripps, and they must avow jointly. These avowants are coparceners, and they must avow jointly. The determination of the lease is sufficiently avowed. It is not necessary to state how it determined. The objection that the notice is only in the name of Octavius Cripps, is of no weight. The notice to quit is a sufficient demand of double rent, and this is a reme-

cial law and not penal; being the same as the *Stat. Geo. II.* (5 *Burrows* 2694.) [Objected here by *Grimke* that the English statute, does not give the remedy by distress.] The verdict for Sol. Moses satisfies him and the plaintiff has no right to object to it. The case from 4 *Cranch* was on a Virginia statute.

As to the new trial. "Unless by the law of the land," means that no man shall be mulct without being called upon to answer. (*Lord Coke*.) This is no more unconstitutional, than the attachment act. In the case of the *State vs. Allen*, the act authorized the tax to be levied without giving him a hearing. The law of distress always subsisted with *magna charta*. Distress warrant quite immaterial.

Toomer, same side.—If the avowants are tenants in common they may avow jointly, (*Cro. Eliz.* 530. 1 *Chitty* 544. 2 *Schwyn* 605.) Whenever the demise has expired, unless expressly renewed, the landlord upon giving notice to quit has his remedy by double rent. (8 *East*. 258.) The plaintiff's letter to O. Cripps was a recognition of a notice to quit. If the avowry be defective it is aided by the verdict. (1 *Chitty* 546.) Annual value, and annual rent, are synonymous.

Mr. *Toomer* was told by the court, it was unnecessary to say any thing on the constitutional objection.

Hunt in reply.—The history of the case is, that at first a distress was issued for the quarters rent, and a replevin thereupon, on the ground of no rent in arrear; but it is now converted into an action for double rent under the act of 1808. In an action for the penalty, rent cannot be recovered. The one is founded on contract, the other in tort. Distress for rent is an acknowledgement of subsisting tenancy (*Brady on Distress* 104. The pleadings cannot be supported; the heirs of Octavius Cripps are not parties. The avowry is for a penalty; and the proof that the taking was for rent. The avowry states the demise to be at an end; and in replevin the plaintiff must recover where there is no demise. Distress

can only be for a sum certain. No proof that Octavius Gripps was the agent of the avowants. The notice to quit was not conformable to the act. It is in the alternative; and plaintiff may stay upon paying the higher rent. But the avowry says there was no lease at the time of the distress. After the expiration of the lease, the plaintiff was a tenant from year to year. Three months notice necessary to determine the lease. (*Gardon vs. Long, Symonds vs. Bay Grimke J. 150.*) As to the constitutional objection, he said the double value was unliquidated; and for an injury founded in tort, the legislature cannot authorize a man to make such reprisals. It is not like attachment; that is a judicial proceeding, and if judgment be given by default, plaintiff must still prove his debt; not so here.

COLCOCK, J.—It is unnecessary to follow the counsel through all their arguments on the subject of the pleadings in this case. For if the second plea of the appellant could by possibility be considered as a demurrer, it would reach the defects complained of; and if it is a plea, and a bad one, of which I can entertain no doubt, then the demurrer of the respondents opens his proceedings to all the objections of the appellant; for it is an established rule that upon the argument of the demurrer, the court will, notwithstanding the defects of the pleading demurred to, give judgment against the party whose plea was first defective in substance. (1 *Chitty* 647.) We are then to enquire whether there are any substantial defects in the avowry or not? and in this inquiry I shall pursue the order of the appellants counsel. The first objection is "that in the avowry the respondents are styled joint tenants and yet it sets forth a tenancy in common. The avowry is joint, as though the defendants had been joint tenants; whereas it should have been several, because being tenants in common they could not unite."—The estate is set forth in the avowry as a joint tenancy and perhaps it may be considered as such. It certainly possesses all the unities which constitute a joint tenancy; an unity of interest

of title, of time and possession; and the only objection which is presented to its being so considered is, that it is said a joint tenancy cannot be created by operation of law. Blackstone in treating of the different tenancies, (2 Vol. 180,) says: "The creation of an estate in joint tenancy depends on the wording of the deed or devise by which the tenants claim title; for this estate can arise only by purchase or grant, that is, by the act of the parties, and never by the mere act of law." He then goes on to treat of estates in coparcenary, and says, that they possess three of the unities which are necessary to constitute a joint tenancy, to wit, the unities of interest, title and possession, and shows that time is not indispensably necessary, though it often must exist in the title: "For if a man hath two daughters to whom his estate descends in coparcenary, the one dies before the other; the surviving daughter and the heir of the other, or, when both are dead, their two heirs, are still parceners." The difference then between these two estates is that the "*jus accrescendi*," does not obtain in the latter, and that the former cannot be created by the mere operation of law. Now when we advert to the fact that lands in England do not descend to all the children of the deceased, we at once perceive the reason why the estate of joint tenancy cannot be created by the mere operation of law; and when we recollect that the "*jus accrescendi*," is taken away in this state, perhaps we may consider this as a joint tenancy. There are undoubtedly objections to this, and I do not mean to decide upon the nature of the estate, because it is not necessary to the determination of the case. Suppose it a tenancy in common, yet the rule contended for cannot apply to this case. It is true that Chitty says: "Joint tenants and coparceners must join in avowry, but tenants in common must sever." But he says immediately afterwards that, "if an action of replevin be against two tenants in common they should join, the one avowing, the other, as his bailiff making cognisance," &c. (1 Chitty 544.) And by a reference to the cases, it will be

seen, that the good sense of the rule is, that when they join or are joined in a suit, they may plead jointly; but if each proceeds for his own interest, each must avow for himself. In the case of *Harrison vs. Barnby*, 5 Term. Rep. 246, the rent had been paid to one tenant in common contrary to the express notice of the other. Lord Kenyon, does say in the case, "that tenants in common ought to avow for their separate portions is clear from the section in Littleton," though he adds, they may join in actions on joint contracts, as in covenant where the covenant is entered into with both.

The *second* objection is, that the avowry should have set forth a notice of three months to quit on the first of June, and not having set it forth, the tenants continued in for another year. This objection is removed in two ways: first, that the tenant himself had given notice that he would quit at the end of the term; and secondly, that if he was in for a second year, it did not prevent a distress for the preceding year.

The *third* objection is, that the notice to deliver possession does not follow the law, which requires the demand to be by the person having the remainder or reversion of the estate, after the expiration of the lease, or the agent of such. Whereas the avowry alleged a demand by Octavius Cripps for himself and his joint tenants, to deliver possession to the said Octavius only.—I can perceive nothing in this objection. The law itself does not say to whom possession shall be delivered, it leaves that to the plain inference of common sense. It says, "the demand shall be made in writing, for delivering possession thereof, by the person having the reversion or remainder therein, or his agent." The demand then was in compliance with the law, and the possession of course was to have been delivered to him who made the demand.

The *fourth* objection that the avowry does not set forth a demand of the quarter's double annual rent, precedent to the distress, which was indispensable, to entitle the defendant to distrain, not for rent, but for a penalty.—The avowry states that in consequence of the demand and the holding over, the

Double rent was due and owing; and it will be presumed, if necessary, after verdict, that it was demanded before the distress. But it seems it is not necessary. *Cobb vs. Stokes*, (8 East 358,) shews that the demand may be made after, in the case of the tenant giving the notice himself that he will quit at the expiration of the term. This is a decision on the statute from which ours was taken. The demand, in my opinion, is not necessary at any time, for he may be considered as voluntarily holding on the terms prescribed by the law.

Having disposed of the objections to the proceedings of the respondents, I proceed to examine the grounds in arrest of judgment and for a new trial.

The first ground is, that the act of 1808 is unconstitutional, so far as it authorizes a distress for double the annual value of the premises when the landlord gives notice to quit, or double rent when the tenant gives notice.

The law does not create a new remedy. The remedy by distress for rent in arrear is as old as the law itself; and the constitutionality of it was never questioned before, that I know of either here or in England, where there is the same guard as is found in our constitution. The act only makes a contract of rent for the parties, under particular circumstances; and if the tenant acquiesces in this contract, which he is supposed to do by holding over, the law refers the landlord to the old remedy. If then the constitutionality of the remedy itself is not questioned, its application to the case before us cannot be. If the law should affix a penalty, *eo nomine*, and authorize a distress, I should think it unconstitutional; or if it should affix a penalty under any other name upon the performance or non-performance of any act, unconnected with any contract, as in the case of *Allen*, I should hold it unconstitutional. But where it affixes a penalty to the non-performance of a contract, and a party enter into such contract, he contracts in reference to the penalty and it is as much his penalty as if he had inserted it in his written agreement.

The *second*, *third* and *fourth grounds* have been sufficiently answered in my observations on the pleadings. To the *fifth* and *sixth*, it is enough to say, that the warrant was in all respects a sufficient authority to the bailiff. To the *seventh* ground, the answer is, that the court in the former cases gave the respondents leave to plead and pursue their rights. On the *eighth* and *ninth*, I remark, that the avowry alleged the annual rent was eleven hundred dollars, and it was not contradicted. To the *tenth* and *eleventh*, it is a sufficient answer to say, that the verdict is in strict conformity with the record. When a jury find for a defendant on all the issues made, a general verdict is good.

Motion dismissed.

Grimke and *Hunt* for the motion.

Petigru and *Toomer*, contra.

LECAT vs. TAVEL.

Quære? Whether under the Statute of Frauds, parol evidence is admissible to prove the consideration of an undertaking to pay the debt of another, when it is not expressed in the agreement itself?

The cases of *Wain vs. Warblers*, *Ramsay vs. Winn*, questioned and commented on.

Johnson, J. Thought if the contract consisted of mutual promises, the whole should be in writing, as constituting the agreement; but if of a promise founded on a past consideration, the *promise* only need be in writing.

The court connected an order, written to defendant, to the promise in writing, of the same date, to shew the consideration; the order being written on the faith of funds in his hands.

This action was founded on the following undertaking:

"Charleston 12th February 1820. I consent to become the security of Mr. DeBillers to Mr. Lecat, for the sum of twenty four piastres, which Mr. DeBillers owes Mr. Lecat, and which I undertake to pay *only in case Mr. De Billers shall fail to pay the same*," "Frederick Tavel."

The plaintiff gave in evidence the following order drawn by DeBillers on the defendant, Tavel. "Charleston 12th February 1820; Mr. Frederick Tavel will be kind enough to pay to Mr. Frederick Lecat or his order the sum of \$24, on account of money, which he has received on my account, not being able myself to keep my engagements with Mr. Lecat."—"DeBillers." He also gave in evidence the record of a proceeding against DeBillers to the return of *nulla bona* on a *fi. fa* and *non est inventus* on a *ca. sa*.

At the trial below an objection was taken, that under the 4th section of the Statute of Frauds, the undertaking of the defendant, was void, in as much as there was no consideration expressed in the agreement. And *Huger, J.* being of that opinion decreed for the defendant, the case being within the summary jurisdiction.

The plaintiff now moved for a new trial upon the grounds:

1st. That the statute does not require that the consideration should be set out in the undertaking or agreement.

2nd. That the order drawn by DeBillers on the defendant of the same date with the writing sued on, was admissible to prove the consideration, and does contain sufficient evidence of a consideration.

JOHNSON, J.—Both in this court and the court below, the counsel for the defendant has rested the case principally on the first ground, which involves the abstract proposition, whether under the Statute of Frauds, parol evidence is admissible to prove the consideration of an undertaking to pay the debt of another when it is not expressed in the undertaking or agreement itself? The determination of this question is not regarded by the court as indispensably necessary to the case, and as doubts are entertained, it will only be noticed so far as may be necessary to state some of the reasons on which they are founded. In *Wain and Warlters*, (5 East 10,) the court of King's Bench lay down the affirmative of the proposition in the broadest terms, and declare, that the consideration, as well as the promise itself must be expressed in writing, to charge the

promiser. The case of *Sears vs. Brink*, (3 *Johnson's Rep.* 210,) and indeed all the subsequent cases are avowedly predicated of it; and if the principle is shaken, they must all fall with it, as a matter of course. The opinion of the court, in that case, turned upon the construction of the word *agreement*, as used in the statute; and without intending to follow the court through the learned arguments to prove the truth of the conclusion, it may well be doubted whether they have not, by refining too much, mistaken the true interpretation. Whether we consult the natural import of the term or its technical meaning, if there is any attached to it, it is resolved into the meeting of the minds of two or more persons, in a matter to be done or not to be done. Their wills unite in determining the expediency or in expediency of doing or omitting to do a particular act. If A, in consideration that B, will undertake to build him a house, promise to pay him so much money, and B does undertake to build the house, their minds meet about the matter, and this constitutes an agreement; and if the consideration of a promise to pay the debt of another, consisting of something moving at the time, and to be afterwards performed, it might perhaps comport more strictly with the letter of the act, that it should be set out on the face of the promise, as constituting a part of the agreement. But if B, in consideration that A had advanced him so much money, undertakes to build the house, here the undertaking is altogether on the part of B; the *aggregation*, the meeting of the minds is passed and gone, and the contract consists altogether of the promise of B to build the house; and in such a case the requisitions of the statute would seem to be fulfilled, if the promise itself was in writing; although like every other contract, to make it obligatory, it must be founded on a good consideration, which might be proved by parol. If this view be correct, it would follow that if the contract consisted of mutual promises, the whole should be in writing as constituting the agreement; but if of a promise founded on a past consideration, the promise only need be in writing; and in this way effect may be given to the

Term without impairing the otherwise most obvious meaning of the statute. The courts have never been reconciled to the case of *Wain vs. Warlters*. In *Inde, ex parte* (14 Vesey 190,) Lord *Eldon* expresses his disapprobation of it, and the same language is held by chief justice *Kent*, in the case of *Leonard vs. Vrendenburgh*, (8 John. Rep. 37,) and in (*Hunt, adm'r. vs. Adams*, 5 Mass. 360-1,) chief justice *Parsons* seems to think that the doctrine is impugned by the case of *Egerton vs. Mathews*, (6 East 307,) and judge *Swift* of the Supreme Court of Connecticut has asserted it with great force. See note to *Wain and Warlters*, 5 East, 10, *Carey's Am. Edition*. The case of *Stephens, Ramsay & Co. vs. Winn*, 2 Al' Cord 372, n.) decided in the Constitutional court, has been relied on by the defendant as conclusive on the question, but in that case, no consideration was expressed on the face of the note, nor was there any offer to prove it by other evidence; so that the question did not necessarily arise, and that case is not, therefore, decisive on the point; and that opinion, like all the rest was expressed on the authority of *Wain and Warlters*. Under these circumstances, the court have thought it advisable to reserve the determination of the question for some further occasion, when it is possible more lights may be thrown upon it.

On the second ground, the court feel no difficulty. It is an universal rule, that in the interpretation of contracts, the court will look through the whole, and that whether it consists of one or several parts, or is or is not contained in the same instrument. And giving to the statute the full effect of the decision in *Wain and Warlters*, it is sufficient that the consideration be in writing. It is obvious that the order drawn by DeBillers on the defendant and the defendants promise relate to the same transaction. The dates are the same, and the parties are the same, and it leads irresistably to the conclusion that the latter was in effect a qualified acceptance of the former. The order is avowedly drawn on the faith of funds belonging to the drawer in the hands of

the drawee, and his silence is an admission of the truth of the fact. It proves, therefore, that the promise made was in consideration of the fund in his hand, and he is bound. The force of this ground was not seen or brought to the view of the court; but as it necessarily arises out of the circumstances, it is thought, the defendant is entitled to the benefit of it.

Motion granted. (a)

Isaac E. Holmes for the motion.

H. W. DeSaussure, contra.

JACOB EGGART *ads.* EX'ORS. H. BARNSTINE.

It is not necessary to the validity of a promise to pay the debt of another, that the party to be charged, should derive a benefit. If it be a damage to the other party, or a suspension, or forbearance of his right, it is sufficient. Or if the contract imports a benefit to the person for whom the thing is to be done; or delay in the collection of a debt; or a temporary discharge from a *ca. sa.*

By the act of 1815, the common law is altered, and a plaintiff may discharge a defendant in custody on a *ca. sa.* for a time, with his consent, without impairing his rights, and may retake him.

Tried at Charleston in January Term, 1824, before Mr. Justice Richardson.

This was an action of assumpsit on the following promise, viz:

"I undertake and promise to pay the plaintiff the amount of the within execution, with interest and costs, on condition that the defendant have indulgence for two weeks from this date, May 22d 1822." Jacob Eggart.

The plaintiff produced in evidence a *ca. sa.* in the case of *Barnstine vs. Schwach*, on which was endorsed the above promise, and the following consent, viz: "I consent to my release in this case under the act of assembly passed in 1815, authorizing creditors holding the bodies of their debtors in

(a) See on this litigated and important subject the cases collected and arranged in APPENDIX, note A.

execution to discharge them without impairing the binding efficacy of their judgments. 20th Feb. 1822. "*F. Schwach*," witness, *Th. P. Harvey*. Plaintiff proved by the testimony of his attorney *Mr. White*, that *F. Schwach* had been taken by that execution and on his subscribing the above consent had been discharged by the following order, viz: "Charleston 20th February 1822. The sheriff will discharge *Frederick Schwach* for sixty days on payment of sheriffs fees. Henry Barnstine." That some time after the expiration of sixty days, he was about again to take the body of the said *Schwach* when the defendant entered into the agreement first mentioned. That no steps had been since pursued to secure the payment of the debt by *Schwach*, and no process whatever issued against his person or property. On being cross-examined, *Mr. White* stated that the contract was not made with the plaintiff but with himself the attorney at law, and he stated that the plaintiff had either authorized him to make such agreement or did not object to it.

When the testimony closed, defendant moved for a non suit, which was refused.

A motion was now made for a nonsuit or new trial on the grounds.

1st. That the promise in this case was made without a legal consideration, and, therefore, not the subject of an action at law, it being *nudum pactum*.

2nd. That the consent to be discharged and the discharge being for sixty days only, the defendant having been allowed to remain out of jail after the expiration of sixty days, operated as a new discharge without his assent and discharged the debt.

Argued, 22d February 1825.

Pepoon, for the motion,—Contended that the discharge of the defendant *Schwach*, was no discharge of the debt. The discharge must be final to constitute a sufficient consideration. (*Roberts on Frauds* 208. *Fell on Mer. Guar.* 16. *Ib.* 277) Two weeks indulgence only; here is the pretended considera-

tion. If the plaintiff has a right to recover from the defendant, he may also recover from Schwach. Forbearance to issue execution, is not a sufficient consideration. (*Com. Dig. Tit. Consideration, B. (1.)*) Forbearing to sue might effect the rights of a party in a different manner from forbearing execution. This was simply a promise to forbear to use his power of arresting the defendant, Schwach.

JOHNSON J.—There is obviously nothing illegal in this contract; and the only question growing out of the first ground of the motion is, whether there was a sufficient consideration to charge the defendant.? Every promise that is made without a consideration is *nudum pactum*; and it follows, as a necessary consequence, that to make them obligatory, there must be a sufficient legal consideration. It is not, however, necessary to their validity that the party to be charged by them should derive a benefit; if it be a damage to the other party, or a suspension or forbearance of his right, it is sufficient, (3 *Burr*: 1663. 1 *Taunt*. 523.) And so if the contract imports a benefit to the person for whom the thing is to be done. (1. *D. & E.* 76.) Assuming for the present that the plaintiff could legally have arrested Schwach on the *casu*: at the time the contract was entered into, it will be found that both of these ingredients entered into the consideration. It was to the damage of the plaintiff. He was to be delayed in the collection of his debt. Schwach might have escaped, and his remedy against him might have been lost. It imparted a benefit to Schwach for whom the thing was to be done. He was for the time discharged from the arrest and detention of his person. In support of this ground, it has been urged that to make forbearance or indulgence a good consideration, it must be total and not partial or temporary. This position is at war with those before laid down. The plaintiff was to sustain a damage and Schwach was to derive a benefit and the liability of the defendant attached. It is opposed too by numerous authorities. In 1 *Roll*, 27 & 15, it is laid down that to discharge a man arrested “for a little while” is a good consideration. Forbearance of a suit for “a certain

time" is also good and the reason given is that it is a present benefit to the defendant. (*Vide Cro: Eliz: 387. 643. 768. 848.*)

By the common law the discharge of a defendant arrested on a *ca: sa:* was a satisfaction of the judgment, and the second ground of the motion is founded on the idea that in as much as the plaintiff did not retake *Schwach* at the expiration of the sixty days, the time limited by the discharge, he could not legally do so afterwards and, therefore, the defendant's undertaking was without any consideration. If it be conceded that the plaintiff could not have again arrested *Schwach* on the *ca: sa:* this conclusion would inevitably follow; but the act of 1815, has altered the common law in this respect. By it, the plaintiff may discharge a defendant in custody on a *ca: sa:* for a time, with his consent, without impairing any of his rights and he may retake him. And if the construction contended for should prevail, it would follow that he could not do so, except the precise moment when the time limited had expired. He could not act before without violating the discharge; and according to the doctrine, he could not act afterwards, so that a defendant would have it in his power, by keeping out of the way, only for a moment, to discharge his debt. But if the discharge and the assent of *Schwach* is put on the footing of a contract, and it imposed on the plaintiff the necessity of retaking him immediately at the expiration of the time limited, it must likewise impose on him, for the same reasons, the obligation of returning to custody at the same time; and if he should fail to do so, on the principle that no one shall take advantage of his own wrong, the plaintiff might have retaken him at a subsequent time; and such is obviously the plain interpretation of the act. A different construction would make it a snare to entrap the innocent and unwary.

The motion is discharged. (a)

Pepoon for the motion.

J. B. White, contra.

(a) See note A in Appendix.

THOMAS vs. WILSON.

On a bond with a penalty of \$5000 to perform covenants, the jury found a verdict for \$500. Held that, interest on the \$500 could not be collected. Interest on judgments can only be collected where the original cause of action bore interest.

This was an action of debt on a penal bond for the performance of covenants. The penalty was \$5000. The jury, under the authority given by the act of assembly, assessed the damages of the plaintiff at \$500. Execution was issued; and the question now made, by a rule upon the sheriff, was whether interest should have been collected by the sheriff, on the sum of \$500. Judge Bay, before whom the motion was made, rejected the rule; and the motion now, was to set aside his decision, and to obtain the rule.

JOHNSON, J.—Before the act of 1815, there was no case in which a plaintiff could collect, on execution, interest which accrued subsequently to the rendition of the judgment; unless, indeed, judgments on bonds conditioned for the payment of money can be regarded as an exception, to which this case has been assimilated. At the common law, the defendant was liable for the whole penalty of the bond; but by the *Statute 4 Anne, c. 16*, (*Pub. Laws* 95,) he may discharge it by bringing into court “all the principal money and interest due on such bond,” together with the costs which had accrued. Now in the case before the court, the sum due on the bond is unliquidated, and cannot, therefore, be brought into court; consequently the analogy between the cases will not hold good. The act of 1792, (*1 Faust* 213, precludes the idea, that bonds conditioned for the performance of covenants were contemplated by the statute. This act provides that the plaintiff may, and the defendant by rule of court may compel him, to submit the condition to a jury, “which jury may asses and fix the debt or damages actually due, and the execution shall be levied accordingly.” Thus negativeing the idea that it should issue for interest also. There

is another view of this subject which is equally satisfactory. This, though in form an action of debt, is substantially an action on a covenant, an action sounding altogether in damages, and in which the jury are supposed to take into consideration all the injury which the plaintiff has sustained by the breach of the covenant; which would necessarily include the interest, if from the nature of the transaction, the measure of the damages could be ascertained by it; and as the statute does not provide for it, the plaintiff could not sue out execution for the interest which subsequently accrued. The act of 1815 has not provided for this case. (*Acts of Assembly 1815, p. 39.*) Its operation is entirely prospective. It provides for judgments hereafter to be obtained and rendered. The judgment was obtained before the act passed. It allows interest to be collected only in those cases where the original cause of action bore interest. The cause of action here was unliquidated damages and does not fall within it.

• Motion dismissed.

Isaac E. Holmes for the motion.

Hunt, contra.

ROBERT MARTIN vs. JEREMIAH THOMPSON.

A defendant, who has been made a party in the court of common pleas, by a foreign attachment against his goods, and who resides in another state, can, under the act of Congress of 1789, transfer the proceedings to the circuit court of the United States for the district where such attachment issued.

But, by the same act, the lien upon the property attached is maintained, to answer the final judgment, in the same manner as if the case had never been removed.

This case was heard by Mr. Justice Waties who made the following report:

“The above case was as follows: The plaintiff, a citizen of this state, sued out of the court of common pleas of Charleston

district, a writ of foreign attachment against Jeremiah Thompson, a citizen of New York, which was served upon goods in the hands of garnishees. The defendant applied to me during the January Term by petition, setting forth the above facts and praying that on complying with the requisitions of the act of Congress of the 24th Sept. 1789, (1 *Graydon's Digest* 242. §. 12. & *Ingersoll's Dig.* 370,) he might be allowed to transfer the case to the circuit court of United States for the district of South Carolina. This was opposed on the ground that under the preceding section of the same law, the plaintiff was prohibited from bringing his foreign attachment against the defendant in the United States court, and the law could not have intended to give to the defendant any other privilege than that of transferring a case which the plaintiff had an election to bring either in the national or state tribunal, and that the law-makers did not design to favour the defendant more than the plaintiff: but I was of opinion that the 12th section of the act was not to be construed and restricted by the preceeding clause and, therefore, granted the petition."

Grimke.—Cases in attachment cannot be transfered from a state court, to United States court, because attachments cannot issue from United States courts. (*Act of Congress September 1789. Ing. Dig. 370. 2 Dal. 396:*) The provision in the act of Congress in regard to attachment of goods, relates only to attachments against aliens and not citizens.

King, contra.—The act of Congress and the constitution of the United States, intended to insure to citizens of different states impartial trials. The case in *Dallas* does not apply, it is an attachment issuing from the United States courts, which cannot be done. The subsequent section of the act of Congress applies to attachments against citizens as well as foreigners. The words are general.

Hunt, in reply.—Foreign attachments not in contemplation of Congress in passing the act. It is the practice in

some states to commence actions by attachment where the defendant is present. Absurd that foreign attachments cannot be commenced in United States courts and yet may be brought there by transfer. Rule is that no case can be transferred to United States court where the action might not have been commenced there. As defendant was not in this, United States, district, he could not be sued there. To send the case to United States court might be to turn the parties out of court entirely, as that court would not (by entertaining jurisdiction) do that indirectly, which they cannot do directly.

JOHNSON. J.—The question submitted to the court is whether a defendant who has been made a party in the court of common pleas by a foreign attachment against his goods, and who resides in the state of New-York, can under the act of Congress of 1789, transfer the proceedings to the circuit court of the United States for the district of South-Carolina? It is admitted that if the defendant had been made a party by process against his person that it would have been his right so to have transferred the case; but it has been contended that by the laws of the United States a foreign attachment cannot issue from the courts of the United States against the goods or estate of the defendant residing in one of the states; and *Hollingsworth vs. Adams* (2 Dallas 196,) is relied on; and hence it is concluded that if a defendant cannot be made a party by attachment issuing from that court, that the court cannot take cognisance of any case originated by that process. But, it will be seen at once, that that case was determined on quite a different principle. The act itself expressly provides, that an inhabitant of the United States shall not be made a party except in the district where he resides or shall be found at the time of suing the writ; so that proceeding by attachment is excluded in a case thus situated. But the 12 section of the act. (*Ingersoll's Digest* 370,) appears to have provided for this very case. If a suit be commenced in any state court by a citizen of the state in which the action is brought, against a citizen of another state, the defendant

is permitted under certain regulations to remove the case to the circuit court of the United States; and the same clause provides, that "any attachment of the goods or estates of the defendant, by original process, shall hold the goods or estate so attached to answer the final judgment, in the same manner as by the laws of such state they would have been holden to answer such final judgment, had it been rendered by the court in which the suit was commenced." That this provision is useless, unless a suit commenced by attachment against the goods and estates of the defendant can be removed, is self evident, and it must prevail, as there is no act prohibiting it.

Motion dismissed.

Hunt and Grinke for the motion,

King contra.

CAPERS vs. WILSON.

The act of 1817, taking away from the Commissioners of the roads the power to grant or open any new road over the lands of persons who shall signify to the board any opposition, &c. was held by the court to extend to "*private paths*," mentioned in the act of 1798, and to all description of ways.

It was also held that the Commissioners had not the power to shut up a new way which they had opened, and to open again an old road which they had closed. The commissioners are not the judges to determine the necessity which gives a way.

Where a party is entitled to a right of way over the lands of others, the owner of the land, and not the claimant of the road is authorized to lay off the road, in such a manner as is least inconvenient to himself; and if he refuse to lay off the road or obstruct it, an action should be brought against him.

It seems, that if the plaintiff is entitled to a right of way over the defendants land, the erection of gates upon the way is not such an obstruction as will give a right of action.

This case was tried before Mr. Justice Johnson. The reporter could not procure the grounds of appeal, as the

Brief is not to be found in the clerks office. The case can be but imperfectly reported without the grounds of appeal, but it is thought best to publish it as imperfect as it is. The following is the report of Judge Johnson.

"This was an action on the case to try the right of way from plaintiffs residence on Wadmalaw island to the public road leading through it.

As long ago as any of the witnesses recollected, there was a road running in the general course of the road in question and differing from it very little, which was used by the persons then residing where plaintiff does. The record of the proceedings of the board of commissioners was produced, from which it appeared that this road, on the application of Isaac Rippon, who was the grand father of the plaintiff, and who then lived where he now does, was laid out on the 12th April 1772. Before 1800, the place, through which the road ran, was woodland, and after that the defendant cleared it, and some disputes arose between the parties about the obstructions which the defendant put on it. In April 1811, the defendant petitioned the board of commissioners to appoint a committee to examine the road and allow him to alter it. In Aug. 1811, they reported and recommended that the prayer of the defendant be granted; which was agreed to, and a committee appointed to lay out the road. In 1812, the committee reported that they had laid out the road accordingly. This road was laid out without the defendants plantation, along the margin of the marsh. It was a pretty good way, but not so good as the old, and subject to injuries from high water. The road remained unobstructed until the defendants fence, along it, rolled down, and he then put some gates across it. On the 5th April 1819, the plaintiff complained to the commissioners about the obstructions, and prayed that the old road might be restored. The petition was granted, and a committee appointed to lay it out. In 1820, the committee reported that they had laid out the road according to the order. The defendant cut ditches across this road and obstructed it,

and for this injury, this action was brought. These two were the only roads ever used from the plaintiff's residence to the public road; and one witness, Mr. Jenkins, stated that the plaintiff's residence was on a point of land surrounded by marsh, and no way could be made to the public road but through the defendants land.

As to the first ground taken on the motion, I observed to the jury that the act under which the commissioners acted, gave them unlimited powers, as to *making and laying out all such public and private ways* as they should deem necessary. And, in remarking on the argument of the counsel, "that their powers were confined to ways arising from necessity." I observed, that the commissioners were to judge of that necessity and that their judgment ought to be respected. But supposing the argument to be good; yet in regard to the present case, the necessity existed, and the commissioners acted within it.

And as to the 2nd ground, I do not know of what the fact assumed in this ground is predicated, as I understand the road was made precisely on the ground laid out by the commissioners, and of the width directed by them; twenty feet including the ditches. The original road ran through the woods and was crooked and narrow. If the objection be that it is not precisely in the track of the old road, the answer is that all the changes were made to cut off the angles in the old road, so that a favour rather than a prejudice was done to the defendant. If the objection be that it is wider than the old road; the answer is, that it is not more than the usual width. If the plaintiff is entitled to the old road, defendant has obstructed it and the action lay; and so if he was entitled to the new road, that was obstructed.

As to the third ground. I did so charge the jury and think so still."

NOTT J.—If this case had been submitted to the jury on the simple ground, that the evidence authorized the pre-

assumption of a grant, the court might not, perhaps, have felt disposed to disturb the verdict: but whether the evidence was sufficient to have authorized a verdict on that ground is a question on which it is not now necessary to express an opinion. Whether the plaintiff was not entitled to a right of way from necessity was also submitted to them; and on that ground they were instructed that the Commissioners of the Roads were authorized to judge of that necessity and to lay out the road according to their view of the subject. My individual opinion is that the act of 1788, from which it was supposed they derived such authority, delegates no such power. My brethren, however, differ in opinion from me with regard to that construction of the act; but as they consider that part of the act repealed by the act of 1817, which brings them to the same conclusion to which I had come, it becomes unnecessary that I should express the views which I had taken of the act of 1788. The act of 1817 provides that whereas much injury and vexation to the citizens of this state have accrued from the improper exercise of the power of the Commissioners of the roads to lay out and open new roads through their plantations and lands: Be it enacted &c. that no board of Commissioners of the roads in this state shall hereafter, have power to grant or open any new road over the lands of persons who shall signify to the said board any opposition &c. Now although that act does not make use of the words "private paths," which are used in the act of 1788 but speaks of "roads" only, from whence it might be inferred that it was only the intention of the legislature to restrain them from laying out public roads; yet when the object is considered, the court are of opinion that it must be construed to include all description of ways, whether public high ways or private paths. The object was to set bounds to that uncontrolled authority which the Commissioners had previously exercised over the the rights of the citizens: And if they cannot be permitted to

exercise such authority when in there opinion the public good requires it, it cannot be supposed that the legislature intended to invest them with the dangerous power of taking the property of one man and giving it to another. If the plaintiff was entitled to a right of way from necessity, the defendant was bound to allow it to him. But he was authorized to lay it off in any manner the least inconvenient to himself. He was under no obligation to subject himself to an inconvenience for the convenience of the other: and if he refused to lay off a road or obstruct one which he had laid off, the plaintiff could have maintained an action against him. But it was a case in which the Commissioners of the roads could not interfere. The road in question then has been opened without any competent authority and against the consent of the defendant; the plaintiff therefore, acquired no right of way by that act of the Commissioners, nor any right of action by the obstruction complained of. The motion for a new trial must, therefore, be granted on the ground of misdirection.

But there are other questions involved in this case which are worthy of consideration.

Suppose the plaintiff entitled to a right of way over the defendants land, is the erecting of a gate upon it such an obstruction as to give a right of action? Is the owner of the land under an obligation to subject himself to the expense and inconvenience of keeping up a lane through his plantation for the accommodation of a single individual? Must he make a thoroughfare for all the community and expose his plantation to the inroads and ravages of all the domestic animals in the country, merely because his neighbour, for whose particular use it is allowed, cannot submit to the inconvenience of opening and shutting a gate? Is such a state of things consistent with those equal rights and privileges which constitute the essential requisites of a free government? These are questions which in all probability must be encountered on another trial. Something like mutual accommodation ought to be expected in such cases; and, I think it

worth the consideration of the parties whether the indulgence of such a disposition might not probably lead to as favorable a result in this case as may be expected from any other source.

Motion granted. (a)

THOMAS GRAY vs. Court of Magistrates and Freeholders.

Granting or denying a writ of prohibition, is in a great measure discretionary with the court. But it is the duty of the superior courts of law to confine all subordinate jurisdictions to their proper bounds; and the question of jurisdiction is to be determined by the superior and not the inferior court. Generally a prohibition may be awarded, as well after, as before, judgment; but the converse is true in cases where the court had jurisdiction of the matter, but was restrained by some statute, and the party by pleading admits the jurisdiction.

A party has a right to appeal, on an application for a prohibition, from an order made at chambers, or on circuit; and it seems the subordinate court has no right to proceed after notice of such appeal.

It has been sometimes the practice to grant a prohibition, until the determination of the appeal.

Motion for a prohibition before Mr. Justice Richardson.

The appellant in this case was taken up under a warrant from John Michel, one of the justices of the peace, on a charge for insolence, and for an attempt to strike Mr. William McDow; and a court composed of the said magistrate and two freeholders was formed for the purpose of trying him under the act of assembly, regulating the trial of negroes and slaves. The appellant filed his suggestion for a prohibition in the office of the clerk of the court for Charleston district, against the magistrates and freeholders to restrain them from proceeding in the trial, alleging in his suggestion that he was not a negro, mulatto or slave under the negro act of

(a) On the subject of a right of Way, see the authorities collected in *Metcalf's Ed. of Starkie on Evidence*, 3 vol: 1676, and the doctrine of Prescription generally is well treated on at page 1200, of the same volume. R.

1740, but a free Indian and the descendant of a free Indian woman in amity with this state; that he consequently came within the exception mentioned in the act and, therefore, was not subject to the jurisdiction of the court of magistrate and freeholders. In support of this suggestion, affidavits in proof of these facts were also filed.

Mr. Justice *Richardson* refused the prohibition, and assigned for reason " that the matter charged was within the jurisdiction of the magistrate and freeholders, and that all the incidental questions, arising out of the facts set up by way of defence, remained within the jurisdiction. He said, were this not the case, any party charged before an inferior court, might, by alleging a fact, raise a question belonging exclusively to a higher tribunal, and thus at pleasure estop the inferior court; *Ex gratia*; any negro might allege that he was a white man, and any man charged with a debt of twenty dollars might allege that the debt was really thirty dollars, and thereby obtain a prohibition. But such allegations ought to do no more than raise a question of fact for the consideration of the inferior court, which if found false, the court proceeds to judgment, or if found true, the defendant prevails. To reply to this, that the oppression of the citizen and the usurpation of jurisdiction may be practised by the inferior court, was only saying what is not to be predicted of the lowest, any more than of the highest tribunal. Both may oppress and usurp and both were equally liable to punishment therefor; but neither can be checked while acting within its jurisdiction, because it may possibly do wrong by its decision."

An appeal was now made on the grounds:

1st. That the writ of prohibition is the only remedy for persons, not subject to the jurisdiction of a court of magistrates and freeholders, when arraigned before such court.

2nd. Because the presiding Judge mistook the law in allowing the magistrate's court to be the exclusive judges of their own jurisdiction.

3d. Because the prohibition filed by Thomas Gray and the accompanying affidavits, shewed the want of jurisdiction, and the writ of prohibition ought to have issued *ex debito justitiæ*.

Argued, 18th March 1825

Dawson, for the motion.—The party may elect to proceed by prohibition or for damages. Prohibition lies against all inferior courts. (5 *Bac. Ab.* 656. *Ib.* 650. *Fitzherbert's Nat. Brev.* 43.) and is demandable of right, upon suggestion. (5 *Bac.* 649. *Prohibition i.*) The superior court is to judge of the jurisdiction of the inferior; and the prohibition must be granted, whenever it appears upon the face of the proceedings that the inferior court exceeds its jurisdiction, or whenever it is made to appear by affidavit. (2 *Nott & Mc Cord* 424. 3 *Black. Com.* 112. 113.)

Johnson, J.—The suggestion, which is supported by affidavits, raises a strong presumption, that the relator was not amenable to a tribunal constituted by a magistrate and freeholders, for the trial of slaves and other persons of colour; and the question now made is, whether the circuit judge did not err in rejecting the application for a prohibition, before the court proceeded to judgment? There is no doubt that granting or denying the writ of prohibition is in a great degree discretionary; (5 *Bacon's Abr. Title Prohibition. B.*) and if the order made in this case had been placed on that footing, this court would have required a strong case before they would have interposed; but it is founded on the opinion that the court of justices and freeholders was the proper tribunal to determine the question of jurisdiction. That it is the province or rather the duty of the superior courts of law to confine all subordinate jurisdictions to their proper bounds, and that the question of jurisdiction belongs exclusively to them, is a proposition too clear to be controverted; and the history of this case, apart from authority, proves to demonstration that this power would be nugatory if they could not interfere until judgment; for it is said that the court on the

refusal to grant the prohibition proceeded to judgment and execution, by inflicting corporal punishment on the relator. There is as little doubt, however, on the score of authority. Generally a prohibition may be awarded as well before as after sentence; but there are some cases in which the converse, of the proposition is true, as in cases where the court had jurisdiction of the matter but was restrained by some statute, then if the party by pleading admit the jurisdiction, a prohibition would not be granted; (*Bacon's Abr. Title Prohibition H.*) And if the court had not jurisdiction of the matter, any step is an usurpation; and although it is possible they may decide correctly, with respect to that question they may err; and in courts organized like this, and from which there is no direct appeal, the remedy comes too late after the sentence is carried into execution. The only objection opposed to the application for the prohibition is the inconvenience that would result from a precedent which would make the superior courts of law the first resort in all cases of this kind, and thus indirectly deprive the subordinate courts of their legitimate powers. But this objection is well answered by the counsel for the motion. A security against its abuse is found in the integrity of the bar, and, surely in the discretion of the superior tribunals. And even admitting, that evils may possibly grow out of it, they are outweighed by the probability, that if indulged in, the uncontrolled exercise of its power, no citizen, whatever his rank or station in life, would be safe in life or liberty. It certainly never was designed to confide to this tribunal, matters of such moment. The sentence of the court, having been carried into execution, any order which this court could make would be nugatory, and the court have only used this occasion to express its opinion on a question, the practice in relation to which seems not to have been settled. And it may be further remarked that the act of the legislature of 1818, gives to a party the right to appeal from an order made at chambers or on circuit on an application for a prohibition, and it may be worthy of enquiry.

whether the subordinate court could proceed after notice of appeal. In a few cases, however, within my own experience, upon notice of an intention to appeal, prohibitions have been issued to restrain proceedings until the determination of the appeal, and this would probably be the best course, as least subject to vexatious delays.

Dawson for the motion,

I. E. Holmes, contra.

GEORGE CLARKE *and others* ads. DANIEL BLAKE.

The act of 1740, authorizes any person to seize and carry to the nearest magistrate, any horses, kept, raised or bred by slaves, who is authorized to sell them. But the horses must have been appropriated for the peculiar use and benefit of slaves.

Though the horses be condemned and sold by the magistrate as the property of a slave; yet the true owner, if he be a freeman may have his action for damages against those who seize his horses. The decision of the magistrate is no bar to the action, and the fact that the plaintiffs agent had notice of the seizure cannot alter the case; as no person can take the necessary oath before the magistrate, but the owner of the horses.

Tried at Colleton, November term, 1824, before Mr. Justice Richardson, who made the following report:

This was an action of trespass *vi et armis* for entering plaintiffs plantation and carrying off four horses, alleged to be the property of the plaintiff. The defence was justification, as patrol in seizing the horses alleged to belong to plaintiffs negroes and not to himself; that the horses were only carried as far as the next magistrate and delivered to him; that the magistrate gave notice to plaintiffs agent to come before him and take the oath prescribed by A. A. 1740, or that the horses would be sold according to law. The agent refused to do so, and the horses were sold at public auction, by order of the magistrate, and defendants received some of the purchase money. The evidence was as follows:

James Sharpe, plaintiffs overseer, said several negroes were allowed to keep horses on plaintiffs plantation. Witness

had these horses driven up and selected a few for plaintiff's use and the rest were sold. A horse and mare were retained and broke for plaintiff's use. In July 1822, G. L. Clark, Peter Basquin, Gilbert Martin and J. J. Sneed came and drove the colts off, and a mare and the colt of plaintiff. Witness told them the two colts were plaintiff's. Defendants said they were the guardians of the law and knew what they were about. The two colts and a mare and colt were taken before Col. Hunter J. P. and sold. The mare was worth \$80; the horse \$100; mare and colt \$40—\$220. Witness offered to swear to the facts before Col. Hunter, who said that as two had belonged to a negro, he did not know how to proceed and wished to consult Col. Martin an attorney; witness when at Hunters, told them the mare and colt never belonged to the negroes, and had told the same to those who took the two colts, i. e. Basquin, Martin &c. he thinks Sneed too. Plaintiff's Attorney, H. Middleton, had ordered the sale of the negro's horses in July 1822. Witness sent the affidavit to Col. Hunter before the sale.

V. Ruger said, Clark, Sneed, Basquin and Martin and witness went together and took the four horses; Clark and witness led off the mare and colt, worth \$40; the other mare and horse, worth \$45 or \$50 a piece. They were all sold.

William Hasell said, he saw defendants at the gate and told them the mare and colt were not negro's property. Patrol warrant to Clark was here adduced.

Brown sworn; the horses sold for \$—; the mare \$77.

Col. Hunter swore Clark made the affidavit; Sharp appeared and witness offered him the oath and he refused to take it, and appeared to doubt Blake's right in the horses. Witness received the affidavit before the sale; witness condemned the horses and ordered the sale, though he received the oath of Sharp before the sale and the answer of Martin. Witness thought the affidavit insufficient as it should have

been made before witness. Took this affidavit alone. Land was to give notice to all concerned.

B. Williams swore Sharp said he did not know whether the mare and colt belonged to the negroes, but he would enquire, &c. At the time of sale Clark said, he would have nothing to do with the mare and colt.

The presiding judge charged the jury that the defendants were protected by the judgment of the magistrate, being a competent jurisdiction, for whatever occurred after judgment; that whether the patrol were justified in taking the horses to the magistrate depended upon the circumstances; but the judge thought it a trespass and that plaintiff was entitled to damages for taking and leading away the horses to the magistrate; but in strict law, for nothing done by order of the justice, there being no fraud or collusion. The jury found a verdict for plaintiff for two hundred and twenty dollars. And a motion for a new trial was made on the grounds:

1st. Because the taking was lawful, as the property was found in possession of negroes:

2nd. That the subsequent proceedings were lawful, and it was the plaintiff's own fault if he sustained injury, because that injury might have been averted, if he had complied with the requisitions of A. A. 1740:

3rd. Because the verdict was contrary to the charge of the court, and to the law, in this, that the remedy, if any, was against the magistrate, and not against the defendants:

4th. Because the damages were excessive and unwarranted by the testimony, and under all circumstances particularly vindictive damages should not have been given.

JOHNSON J.—The grounds taken in support of this motion are resolvable into the questions:

1st, Whether the seizure of the horses by the defendants was justifiable; and,

2ndly, If not, the extent of their liability.

These will be noticed in their order: 1st, The act of 1740, (*P. L.* 171,) authorises any person to seize and take

away from any slave any horses, &c. kept, raised or bred for the peculiar use of any slave, and to deliver them to the nearest magistrate. The power delegated by this act to the captor is wholly ministerial; and it is clear that to justify its execution, the state of things contemplated must substantially exist; as when a sheriff or other officer takes the goods of a stranger in execution, then he acts upon his own responsibility and is liable for all the consequences. Now the ground on which the justification in this case is attempted to be supported is that the horses were in the possession of slaves. In the first place, from the evidence reported, it does not appear that this was true in point of fact, and it is equally fallacious in point of law. It is not the possession of the slave which authorizes the seizure, but the circumstance that they were kept, raised or bred for the peculiar use of the slave, which justifies it. The fact that horses kept for the use of plantations are generally attended to and used by slaves is notorious, and it can never be believed that the Legislature intended to expose to seizure all that might be found in the accidental possession of slaves. The horses in question were the property of the plaintiff at the time of the seizure, they were not then appropriated for the peculiar use and benefit of slaves. The state of things contemplated by the act, did not exist and the seizure was a trespass on the part of the defendants.

2nd. The general rule as applicable to the second question is that he who commits an unlawful act is liable for all the consequences. The loss of the horses being the consequence of the seizure, and that being unlawful, it follows, necessarily, that the defendants were liable for their full value and that the verdict ought, therefore, to stand. But it is said in support of the motion, that admitting the original taking to be trespass, the delivery to the magistrate and his adjudication and condemnation so far purged the wrong as to exempt the defendants from all responsibility for the ultimate

loss of the property. There is no disposition to control the general proposition that when goods are taken out of the possession of one whose possession is tortious by a course of judicial proceedings to which the rightful owner is a party, that the wrong doer would be *pro tanto* exempted from responsibility; but in this case the plaintiff was not a party and could not be affected by any order which the magistrate could have made. The circumstance that the plaintiff's agent had notice of the proceedings cannot alter the case. To entitle the owner to a restoration of property thus seized, the act prescribes the form, and requires him to take an oath, which, from the nature of it, a mere agent is incompetent to do, besides involving the absurdity that a man can swear by proxy. Motion dismissed.

De Saussure, for the motion.

Petigru, Attorney General, contra.

LYON, *ads.* FLEMMING, and BROWN, *ads.* SCHRODER.

If a circuit judge, whose duty it may be to hold any particular court, should be absent, from indisposition, &c. any other circuit judge is authorized to supply his place: The judges of the appeal court are only required to do so, in case of the absence of any circuit judge or chancellor.

NOTT, J.—The only question in these cases is, whether if a circuit judge, whose duty it may be to hold any particular court, should be absent from indisposition, any other circuit judge is authorized to supply his place during such indisposition? No doubt has ever been entertained on this subject until since the act of the last session of the legislature reorganizing the judiciary system of this state, nor do this court entertain any doubt upon the subject now. The judges are not located in any particular circuit; their duties are not confined to any particular section of the state. The distribution of their duties is a matter of arbitrary arrangement among them-

selves; and it can never be said to be the exclusive duty of any one judge to hold any particular court. By the act of the last session, the circuit judges are relieved from the duties which they were before required to perform as an appellate court. But the same act declares that they are invested with the same powers, authority and jurisdiction to all intents and purposes, (except those appertaining to the constitutional court,) as the present judges of the courts of law now have. And even if it had contained no such provision, it appears to me it could have admitted of no other construction. For although the judges of the court of appeals are required in the case of the absence of any circuit judge or chancellor to supply his place, the circuit judges are not deprived of any power which they before possessed in that respect. Lord *Coke* says the designation of a certain person to whom a new power is granted in an affirmative statute, does not exclude another person, who was by a preceding statute authorized to do it, from doing the same thing. (11 *Reports* 64, *Foster's case*) The object of the legislature was to require the judges of the court of appeals, in addition to their other duties, to aid the circuit judges in the performance of their circuit duties, to prevent a failure of justice, from the occasional absence of a judge. But it was never intended to deprive the other judges from exercising the same power. This court are, therefore, unanimously of opinion that the circuit judges do now possess all the power and authority in that respect which they possessed anterior to the passing of the present act.

THOMAS BARKSDALE vs. J. MORRISON.

Under the act of 1733, allowing magistrates double costs, in any action, suit, bill, plaint or information, commenced or prosecuted against them, they may recover double courts in a *qui tam* action brought against them.

A notice was served by J. B. Legare on Holmes & Waring, that a motion would be made before W. S. Smith

Prothonotary of Charleston, to tax a bill of costs in this case. On the day appointed Mr. Legare, defendants counsel, moved to tax a bill of double costs, upon the ground, that this was an action brought against a magistrate.

To this, it was objected, on behalf of the plaintiff; 1st. that no costs ought to be taxed, because the action was *qui tam*; 2nd that if any costs be allowed, double costs ought not to be, because this was not a case contemplated by the act of assembly.

These objections were overruled by the prothonotary, and the bill for double costs was taxed accordingly.

On an appeal to Mr. Justice *Huger*, the prothonotary's decision was confirmed.

An appeal was now made from his decision on the grounds:

1st. That no costs ought to be taxed for defendant in a *qui tam* action:

2nd. The defendant was not entitled to double costs, because the action was not brought against him for any matter, cause or thing by him done in performance of his office.

Argued, 2d. March 1825.

Isaac E. Holmes, for the motion.—No costs are allowed in *qui tam* actions. (2 *Bac. Ab.* 50. *Tit. Costs.*) If one party is not entitled to costs the other is not. (2 *Com. Dig.* 243—8. *Tit. Costs.*) The plaintiff in a *qui tam* is not entitled to costs. (1 *Vent.* 133. 1 *Salk* 206. *Cro. Car.* 542.) The statute of 8 Eliz: c. 5 allows costs in *qui tam*, which is not of force here. (*O'Driscoll vs. M' Cants*, 2 *Bay*, 323.)

J. B. Legare, contra.—The act of 1733, (1 *Brev.* 462. *Pub. L.* 135,) says, "In any action, suit, bill, plaint or information against a magistrate, he shall have double costs. (2 *Bac.* 495, *Costs.* 1 *Doug.* 294—5. 1 *Term. Rep.* 252.

Norr, J.—It is not necessary to resort to English authorities to enable us to determine the first question made in this case. It depends upon the construction of our own

act of 1733, which allows magistrates double costs "in any action, suit, bill, plaint, or information which shall be commenced or prosecuted against them, wherein the plaintiff shall be non-suited, or verdict shall pass for the defendant;" (P. L. 135.) Admitting, therefore, that costs are not allowed by the english law (or were not before Statute 8 Eliz: c. 5. which is not of force here,) in *qui tam* actions, it is obvious that it was the intention of the legislature to embrace cases of that description in this act. The act was to protect public officers from groundless and vexatious actions and prosecutions; and I think the words of the act sufficiently broad to effect the object. The act under which the defendant was prosecuted authorizes the penalty to be recovered by "bill or plaint, only;" the very words used in the act under consideration, as descriptive of the actions or prosecutions in which the double costs should be allowed.

The second ground is, that the defendant was not sued for any thing done in pursuance of his office. But by a reference to the record, it will be found that he was charged with having sat on a certain trial in the capacity of a magistrate having omitted to sign the roll as required by law; (P. L. 301.) Omitting to sign the roll did not effect his qualification as magistrate. He was not less subject to the immunities and privileges of a public officer on that ground. The act itself recognizes him as such. He was, therefore, sued for an act literally done in pursuance of his office as a justice of the peace. The court are of opinion that the costs are properly taxed and that this motion must be dismissed.

I. E. Holmes for the motion,

J. B. Legare, contra.

THE STATE, vs. HENRY WILSON & JAMES DAVIS.

When two persons are indicted together, for stealing the same goods, one cannot be convicted of petit larceny and the other of grand larceny.

So it seems of burglary, if one be convicted of larceny only, the other cannot be convicted of burglary.

When new trial granted, for want of evidence, in an indictment for larceny.

Tried before Mr. Justice Bay in October term, 1824, who made the following report of the evidence:

"John Anderson, the prosecutor, proved that, in the month of June last, as he was going on board of his schooner, then laying at Crafts' north wharf, in Charleston, he discovered Davis on the wharf, near the vessel. He got up from behind some casks and then walked up the wharf. When he went on board of his schooner, he discovered that the companion door had been broken open. He went down into the cabin, and there being no light in it, he felt about in order to discover whether there was any body in it or not, and soon found the prisoner, Wilson. Upon enquiring of him who he was and how he came there, he said one of his sailors had given him permission to come on board, and that he belonged to the sloop Mary. Witness said he had no sailors on board his schooner, he had discharged them the day before. Witness then laid hold of him and dragged him to the forward part of the cabin, and then brought him upon deck. Witness called out to one of the guard men he had passed in coming down to his vessel; but not getting an answer he jumped on the wharf. At the same time, Wilson jumped off the quarter deck of the schooner and attempted to run. The witness ran up to stop him, when he drew a dagger on witness and made seven or eight passes at him; but gave him only one wound on the fingers; upon which he closed with the prisoner and threw him and took away the dagger from him. On which he immediately discovered it was his own dagger, which prisoner had taken out of the cabin. Witness still called out for assistance, when one of the guard came up, and Capt. Town soon after. Witness then

requested Capt. Town to remain on board his schooner while he assisted the guard men in taking Wilson to the guard house. The prisoner gave witness a blow after he was in the guard house. When witness returned to his vessel, Capt. Town had procured a light from his mate and steward, who were also there. Witness was preparing to go to bed, when Davis came down (this was some time after he had returned from the guard house) and hailed him and asked what had become of the man he had found in his vessel. He gave him an evasive answer, in hopes of some person coming to his assistance. Davis said the man was an old ship mate of his and fellow boarder. The guard soon after came down, and they secured Davis and took him to the guard house. When witness returned again to his vessel, after securing Davis, he discovered that his trunk had been broken open or unlocked, and emptied of all its contents, and put into a clothes bag, on which Wilson lay when he first found him, behind a desk, on his first entering the cabin. Witness also discovered that the mate's trunk had been taken out of the cabin to the fore part of the schooner, but not opened. The contents of his trunk were, six shirts, five pair of pantaloons, eleven pair of socks and stockings, three or four vests and outside jackets. His sword had also been taken out of the cabin and carried on deck. On being cross-examined, witness said that Davis was concealed behind a cask when he first perceived him. Here the testimony closed. The court observed to the jury that there could be little or no doubt as to the guilt of Wilson, as the testimony was very clear against him; but that it did not appear that there was sufficient evidence against Davis to convict him as a principal in the offence; but the jury thought otherwise, and brought in the following verdict, viz: "We find Henry Wilson guilty of *grand larceny*, and James Davis guilty of *petit larceny*."

NOTT, J.—The question involved in this case may be considered as settled in the case of the *State vs. Larumbo*, (*Harper's Rep.* 188.) The only difference between the two

cases is, that in that case, Cassada who was indicted with Larumbo and found guilty of petit larceny had acquiesced in the conviction, and received the punishment; Larumbo who appealed on the same ground which is now taken, obtained a new trial. The reasons on which the new trial was granted although not detailed in the opinion, I think, are obvious and well supported by authority. Grand larceny consists in the stealing of money or goods to the value of twelve pence or more, petit larceny in stealing any thing within that sum. Two persons equally concerned in stealing the same article cannot be guilty of different offences. For although a jury have an almost unlimited power of valuing stolen property at what they please, so as to bring the case within petit larceny, they cannot value it at one price in the hands of one man and at another price in the hands of another, who are equally concerned in the transaction, for the purpose of subjecting one to a greater punishment than another; and, although, they may value property which is laid in the indictment to be worth twenty shillings, at sixpence only, and thereby convict the party accused of petit larceny; yet if the property stolen is laid in the indictment to be worth only sixpence, they cannot by any subterfuge or legal fiction find him guilty of grand larceny. So when they have themselves estimated the goods stolen to be of less value than a shilling, by convicting one of the party of petit larceny, they cannot convict the other of grand larceny, who had only participated in the same theft; for the goods having been found of less value than twelve pence, they are not the subject of grand larceny. The prisoners have either been guilty of two distinct offences, and, therefore, ought not to have been indicted together, or they have been guilty of the same crime and should have been convicted of the same. The verdict, therefore, in either view is inconsistent and must be set aside. The same principle prevails in burglary and for the same reasons. If one be convicted of larceny only, it repels the idea of the goods having been stolen in the night,

and therefore the other cannot have committed burglary. In petit-treason and murder, the law is otherwise. There can be no treason where there is no allegiance. The same act constitutes a different offence, according to the relation in which the accused stands to the deceased; one may, therefore, be convicted of treason, and the other of murder. On an indictment for murder also, one may be convicted of murder and the other of manslaughter. The character of the offence depends so much upon the circumstances of the transaction and the motives and inducement of the parties engaged in it that the jurors are authorized to discriminate between their respective degrees of guilt. But there can be no difference in the degrees of guilt, when the nature of the offence depends upon the value of the property or the time when it was taken. It may be said that Davis who has been convicted of petit larceny only, has no right to complain; for if he has been guilty of any crime, it cannot be less than that of which he has been convicted; and I think, I should have been of that opinion, if the testimony had been such as to have authorized his conviction even of that offence. But as to him I think the verdict is clearly without evidence.

The motion for a new trial must, therefore, be granted.

THE STATE, vs. THOMAS WIMBERLY.

In indictments, it seems, neither clerical nor grammatical errors will vitiate, unless they change the word or obscure the meaning.

On an indictment, under the act of 1821, for killing a slave in *sudden heat and passion*, charging it to have been done *feloniously*, does not vitiate the indictment.

The indictment in this case was in accordance with the precedents at common law for manslaughter, and was held to be good.

It is a general rule that the special manner of the whole fact should be set forth in the indictment with such certainty, that the offence may judicially appear to the court; but precise phraseology need not be used, except when technical words are necessary in the description, to give character to the offence. It is sufficient if the idea is clearly and distinctly expressed.

So, in indictments for murder or manslaughter, it is indispensably necessary to state that the death ensued in consequence of the act of the prisoner.

This was an indictment for killing a slave in heat and passion.

Tried before Judge Colcock.

The indictment in this case was in the common form and contained two counts, for murder, and manslaughter at common law, omitting, however, the averment that the deceased died of the wounds inflicted. The prisoner was convicted on the second count in the indictment which was framed on the second clause of the act of the 20th December 1821 for killing a slave on sudden heat and passion. This count charged that the prisoner, "in and upon a certain negro slave named Dick, the said Dick being the property of Barbara Holmes in the peace of God and of this State then and there being, feloniously and upon sudden heat and passion, did make an assault &c." and after setting out the instrument with which the wounds were inflicted, their nature and extent, in the usual way, concludes thus; to wit, "of which said mortal wounds the aforesaid slave Dick then and there languished, and languishing did live, for the space of half an hour, and at the expiration of said half hour then and there died; and so the jurors aforesaid upon their oaths aforesaid do say that the said Henry Wimberly, the said slave Dick in manner and form aforesaid *feloniously* and upon sudden heat and passion did kill and slay against the form of the act of assembly &c."

A motion was now made to arrest the judgment on the following grounds,

1st. That the structure and averment of the count present the crime of manslaughter at common law and not the killing on sudden heat and passion under the act.

2nd. Because the averment, that the deceased died of the wound, is omitted.

Ellison, contended that the indictment was wrong in stating the offence as felonious. The legislature, by the act intended to create a new offence. The killing in *heat and*

passion was made a misdemeanor; and was not intended to be subject to the principles of the common law. It is punished by a fine. Felonies at common law carry with them forfeiture of goods. This is a statutory felony made so by the act; and the instrument must describe the offence specifically. (*Crown. Cir. Comp.* 105.) The indictment avers that he died at the expiration of the half hour, but not of the wounds. The charge must leave nothing for inference. (*Ib.* 105.)

Elmore, solicitor contra,—If there had been no legislation on the subject, it would be indictable at common law. It is the killing of a reasonable creature and the act only changes the punishment. (*see act of 1740.*) No new offence was intended to be created, only a new punishment. Otherwise no case of manslaughter but killing in heat and passion, would be punishable under the act. As to the second ground the plain construction of the indictment is, that he died of the mortal wounds.

Ellison, in reply—Slaves have no personal rights. The act of 1740 adheres to the old forms, but does not make it manslaughter, which would be felony. To say he was in the peace of God and the state, was not applicable to the condition of a slave. Before the act of 1740, defendant might have been indicted at common law. A slave is no body. He has no personal rights. If you apply the common law, *in extenso*, you must have express or implied malice. The word *feloniously* is not surplusage and therefore can not be stricken out.

JOHNSON, J.—In its general structure this indictment is in strict accordance with the precedents of indictments for manslaughter at common law, and the only objection raised to it in support of the first ground of the motion is, that the word *feloniously* is introduced, as giving a character to the offence not warranted by the act. It is not necessary for the present purpose to determine whether the offence is under the act a felony or not. If it be a felony, the word *feloniously* is indispensibly necessary; but admitting that it is only a

misdeemeanor, yet its introduction does not vitiate the indictment. The general rule is, that mere surplusage will not vitiate; as when an indictment for an offence at common law concludes *contra formam statuti*. (1 *Cowp.* 683. 5 *D. & East*, 162.) And so, when in giving character to an offence, the word *knowingly* was unnecessarily introduced, it was held to be mere surplusage. (2 *East, Crim. Law*, 452.) If the offence set out in the indictment be indeed a mere misdemeanor, it is difficult to conceive of a term more foreign to it than that of *feloniously*. It is a character which, when applied to the subject matter, is wholly unmeaning, and falls clearly within the rule.

As to the second ground, it is a general rule that the special manner of the whole facts should be set forth in the indictment with such certainty that the offence may judicially appear to the court. And in its application it is clear that in indictments for murder or manslaughter, it is indispensably necessary to state that the death ensued in consequence of the act of the prisoner. But I apprehend that the pleader is not confined to any precise phraseology, except when technical words are necessary in the description to give character to the offence. It is sufficient if the idea is clearly and distinctly expressed; for neither clerical nor grammatical errors will vitiate, unless they change the word or obscure the meaning. (5 *D. and E.* 317-8.) And as more directly applicable to the present question, it is laid down in 4 *Harg. State Trials*, 747, (cited in 1 *Chitty's Crim. Law*, 173,) that it is not necessary to repeat the nominative case to all the allegations in one continuing sentence. If the sentence objected to in this indictment be read by supplying the nominative case before each verb, as authorized by the rule, it would read thus:—"Of which said mortal wounds the said slave Dick then and there languished; of which said mortal wounds, he, languishingly, did live; for the space of half an hour, and at the expiration of the said half hour, of the said

mortal wounds then and there died:" So that the idea is clearly and distinctly expressed, and the grammatical construction of the sentence preserved.

Motion refused.

Ellison for the motion.

Elmore, solicitor, contra.

JAMES CUTHBERT vs. WINBORN LAWTON.

Where a way had been uninterruptedly used from 1769 to 1800, but after that period had not been used much, and had been obstructed three or four times in different years, and some wide deviations made from its original course, the court held the right not destroyed, having been perfected by twenty years uninterrupted enjoyment.

But if it had only began to accrue since 1800, it *seems* the obstruction of one year only in twenty, would prevent its legal consummation; but after twenty years uninterrupted use, it could only be defeated by an *adverse* and continued obstruction for five years.

Tried before Mr. Justice Waties, at Charleston, who made the following report:

"There were two distinct issues, between these parties, tried by consent at the same time. One in assumpsit on an award, and the other in trespass to try the general right to a private way which the plaintiff claimed through the land of the defendant by prescription. I recommended to the jury to give their attention chiefly to the second issue, as a verdict for the plaintiff on the award would leave the extent of the right of way still open to future controversy; because the declaration enumerated specially the uses claimed, without including the privilege of driving cattle on it, which was the only real subject of dispute between the parties. In considering the general right of way, I was of opinion, that this had been fully established by the evidence of Mrs. Rivers, W. Royal, Gen. Cuthbert and Wm. Lawton, who proved that it had been enjoyed by the former owners of the land now held by the plaintiff as an ancient and uninterrupted right, from the year

1769 to 1800. It appeared, indeed, *that since that period the road had not been much used*; that it had been obstructed three or four times in different years, and that there had been some wide deviations from its original course; but I thought that these would not affect the right, if it had been before perfected by twenty years uninterrupted enjoyment. If it had only began to accrue since the year 1800, the obstruction of one year only in twenty would prevent its legal consummation; but after twenty years of uninterrupted use, it could only be defeated by an adverse and continued obstruction for five years, which was not proved in this case. I referred the jury, for their guide, to the law on the subject as laid down by the Constitutional Court in the case of *Lawton and Rivers*, (2 *McCord* 451,) and which, I added, was recognized as the law thirty years ago. They gave a verdict for the defendant on the award, and on the second issue they found for the plaintiff an unqualified right of way." From this verdict the defendant moved for a new trial.

NORT, J.—The court concur in opinion with the court below. And the evidence having been submitted to the jury with a correct exposition of the law, there does not appear to be any good ground for a new trial.

McCall and *Toomer* for the motion.

I. E. Holmes and *Waring*, contra.

W. R. H. TREADWAY, vs. I. D. NICKS and I. A. JOHNSON,

Where the defendant drew an order on another person in favor of the plaintiff, the plaintiff must allege and prove in a suit against the drawer that he presented the order, and that it was not accepted, or that it was accepted and not paid, and that the defendant had notice of the non acceptance or non payment. Merely stating that such third person, "although often requested to pay to the plaintiff, had hitherto wholly neglected and refused," is not a sufficient allegation.

So, where an order stated no consideration, the plaintiff cannot recover on a count stating it to have been given for "*value therein acknowledged*."

In declaring on contracts not under seal, which do not contain within themselves the acknowledgement of a consideration, or from which a consideration is not implied by law, it is incumbent on plaintiff to set out and prove a consideration.

Tried at Charleston, before Mr. Justice Bay.

This was an action of assumpsit, brought on the following order:

Charleston, June 13th, 1822.

MR. P. CARR—Please to pay Mr. W. B. Treadway out of the second quarter of the rent which may be due to the administrator of the estate of Richard Fair, fifty-five dollars; and fifty-six dollars out of the third quarter's rent as aforesaid, and this order complied with confers a favor fully acknowledged by.

Your most obedient servant,

J. D. Nicks, Adm'r. & Guar-

Accepted,

dian to the estate of Rd. Fair, dec.

June 22d, 1822.

J. A. Johnson, Guardian to

[Signed]

R. Carr.

the children R. Fair.

The defendants Attorney moved for a non-suit on the following grounds, viz:

1st. That the second count in the declaration contained no averment of a presentment for an acceptance, or of an acceptance.

2nd. That the third contained the words "value received" which were not supported by the instrument itself.

3rd. That the order not being within the statute, and no consideration being stated or proved, could not be given in evidence under the money counts.

The motion was refused. The defendants counsel then offered to prove the real nature of the transaction. This also was overruled by the presiding judge, and he directed the jury to find a verdict for the plaintiff with interest. In addition to the above grounds of nonsuit the defendant offered the following for a new trial.

1st. That the plaintiff was guilty of laches in not giving notice earlier to defendant Johnson.

2nd. That the promise of Johnson was void under the statute of frauds, there being no consideration stated or proved.

3rd. That the presiding judge refused to hear evidence on the part of the defendants to prove want of consideration.

M'Cready, for the motion.—No evidence has been given as to the first count. No consideration proved under the 2nd and 3rd. It is admitted not to be a bill of exchange. (10 *John. Rep.* 418. 2 *M'Cord* 218.)

Clarke, contra, cited *Kyd on Bills*, 197. *Bull N. P.* 137. 2 *Phillips Ev.* 40, 41. Bill may be given in evidence to support money counts. (*Chitty on Bills* 467. *Last Ed.*) It was an admission, at least, of a debt, and suppose witness to have proved an acknowledgement of defendant that he owed so much, it would support the money counts; and why not this? (*Chitty on Bills* 471. 1 *Henry Black. Rep.* 601.) The bill was not declared on; it was only offered in evidence. The case in 10 *Johnsons Reports* does not apply. Here was no subsequent acknowledgement and promise to pay. (2 *John. Rep.* 240.) Bills and notes are evidence. (*Chitty* 87. 3 *Caines' Rep.* 286.) Subsequent acknowledgement is a proof of consideration. (1 *Chitty Plead.* 343, in *Margen*, 254.) Admitted to prove account stated, &c. (1 *Es-pinasse's Rep.* 496. 13 *East* 249.)

Boylston, in reply.—There was no evidence of subsequent acknowledgement. As to the laches in not presenting and giving notice of non payment, he cited 5 *Mass. Rep.* 299.

JOHNSON, J.—The declaration in this case, in addition to the usual money counts and a count on an account stated, contained two special counts, being the counts referred to in the 1st and 2nd grounds of the motion. The first of these charges that the defendant, "being then and there indebted to the said plaintiff, in another sum of one hundred and

eleven dollars, in consideration thereof, then and there gave an order in writing," &c. After setting out the order drawn by defendants on Carr, concludes by avering, "that the said R. Carr, although often requested to pay to the said plaintiff the aforesaid fifty-four dollars, &c. and fifty-six dollars, has hitherto altogether neglected and refused, whereby, &c." without alleging that the order had been accepted and not paid, or that he had not accepted, or that the defendant had notice.

The other count, referred to in the second ground, as a part of the description of the order, uses the words "value therein acknowledged" &c. It is a well settled rule, if the plaintiff declares on a special contract, he cannot give a different special contract in evidence on the money counts, because it is calculated to surprize the defendant. The plaintiff was not, therefore, entitled to recover on the money counts, nor on the account stated; for there was no evidence to support them: so that the case must turn upon the sufficiency or insufficiency of the special counts. In reference to the first ground, the rule is, that it is incumbent on the plaintiffs to state such a case on their record as will clearly show the defendant's liability. Now to charge the defendant, it was indispensably necessary that the order should have been presented to Carr, and that he should have refused to have accepted or had accepted and not paid; and the defendants should have had notice of the non-acceptance or non-payment by Carr; and this count contains no such averments. The case of *Saxton et. al. vs. Hutchinson*, 10 *Johnson R.* 418. (see also 2 *McCord* 218,, is conclusive as to the second ground. It is there laid down that a note in which the words "value received" were not inserted did not support a count in which, as a part of the description of it, those words were inserted; and the variance was held fatal. In declaring on contracts not under seal, which do not contain within themselves the acknowledgement of a consideration, or from which a consideration is not implied by law, it is incumbent on the plain-

iff to set out and prove a consideration. But the application of it to this case is not deemed necessary, as the case must go off on the other grounds.

The motion for a nonsuit is granted.

Boylston for the motion.

Clarke, contra.

COURT OF APPEALS,
OF THE
STATE OF SOUTH CAROLINA,

April Term, 1825—Columbia.

JUDGES PRESENT,

Nott, Colcock, Johnson.

WM. KINCAID vs. WILEY NEALL.

Where a magistrate issued an attachment, and a few days afterwards the defendant came in and confessed judgment, the court held that the lien of the attachment could not be postponed to subsequent judgments, because no bond was to be found in the clerk's office, as it will be presumed the magistrate did his duty and that the bond was lost, unless the contrary be shewn by more positive evidence.

The act which authorizes constables to serve attachments, does not say, they shall not levy an attachment which issued for more than £20, but that they shall not take more than £20 of property into their possession by virtue of any attachment. The limitation having reference to the property and not to the attachment.

It is not necessary when one sues for a debt, that he should demand the interest.

A third person, though a judgment creditor, can not set aside the lien of an attachment on account of irregularities in issuing and suing the attachment, the same having been waived by the defendant in attachment. (a)

Tried before the Hon. Judge Colcock.

William Kincaid brought this action by summary process, to recover from the defendant £40, being the amount of

(a.) See *Foster vs. Jones*, 1 McCord, 116.

property belonging to Wm. Gloss, which the defendant had sold under execution. The facts were these. Wm. Gloss was indebted to several persons in the neighbourhood in which he lived, among whom was the present plaintiff. On the 29th May 1822, the plaintiff went before a magistrate and took out an attachment for his debt, which, on the same day, he had levied by a constable on the property belonging to William Gloss. The plaintiff's debt, as set forth in the attachment, consisted of a book account for \$51,43 cents, also a note for \$33,68 cents, with interest from the 1st January 1822, making the amount due on the day on which the attachment issued including the interest on the note, \$86,20.

The clerks office was examined and no bond could be found, which the magistrate should have taken and returned, as is required by law. On the 30th May 1822, the constable who had levied the attachment also levied several executions on the same property, at the instance of other creditors, by virtue of which executions the property was afterwards sold.

Wm. Gloss, three days after the issuing of the attachment, came forward and confessed a judgment to the plaintiff for the debt, for which the attachment issued, which judgment was signed and execution taken out on the 14th June 1822. The plaintiff after the property had been sold under the above executions, required the constable to pay over the proceeds of the sale in satisfaction of his debt; contending that the plaintiff's attachment and levy under it, were void, and that the money belonged to the executions. The constable having refused to pay the plaintiff the money, he brought this suit. On the trial it was contended for the defendant that the attachment, under which the plaintiff claimed a lien on the property was void, because the plaintiff had not given to the magistrate an attachment bond, and because no such bond was returned to the court; both of which are required by the act of the legislature. The court was of opinion that the attachment was void; but that a third person had no right to take the objection.

It was further contended, that admitting the attach-

ment to have been good, the levy made by the constable was void, in as much as the debt for which the attachment issued exceeded twenty pounds.

The court also overruled this objection and gave a decree for the plaintiff.

The defendant appealed and moved the court to reverse the circuit decision, and for a decree on the grounds above stated.

Colcock, J.—As to the first ground of objection to the decree in this case: It was not proved that there was no bond taken, as the brief states, but it was inferred from the circumstance that the bond could not be found. Now the court would presume that a bond was taken and has been lost or mislaid. It is always fair to presume that an officer has done his duty, until the contrary appears. The bond may have been taken, but not returned. The absconding debtor came in three days after and confessed judgement, and the magistrate may have thought that it was therefore unnecessary to return the bond.

The second ground of objection, at first view, seems to be more important; but on examination, it cannot prevail; for the act which authorizes constables to take property on attachment, does not say they shall not levy an attachment which is issued for more than twenty pounds, but that they shall not take more than that amount of property into their possession by virtue of any attachment. The words of the act are: "Whereas the *seizing* of property under attachment is at present confined to sheriffs alone, be it enacted that any constable, within each and every county, may take property under attachment, provided the same does not exceed twenty pounds." (1 *Brev. Dig.* 41.) The limitation of amount has reference to the property, and not to the attachment. This is manifest from the intention of the legislature, as well as the phraseology of the clause. The legislature, while they gave to these subordinate officers the power of taking property under attachment, meant to guard against their

having in their possession too great an amount. When a man was about to abscond with forty or fifty dollars worth of property, it was conceived to be as proper that it should be seized on by a constable as by a sheriff. For, of the former there are many, and of the latter only one. The intention is also manifest from the phraseology. If the restriction had been intended to relate to the attachment, the language would have been, that constables should be permitted to levy all attachments which may be issued for sums under twenty pounds. If the restriction then applies to the amount of property, and not to the amount of the attachment, the constable did not exceed his authority, for the property taken was worth only forty dollars. But if the strict grammatical construction must prevail still the objection cannot be maintained, because the attachment may be well considered as issuing for a sum within twenty pounds. It is not necessary when one sues for a debt, that he should sue for the interest; it follows as a matter of course. The demands then of the plaintiff were on an account \$ 51 53, and on a note \$ 33 68, which makes \$ 85 21 cents; which is £ 49 17 10. But if these objections were better supported, if the bond had not been taken, and the attachment had issued for a very few cents more than the twenty pounds, it is not permitted to a stranger to take these exceptions to the proceedings. These provisions of the law are intended for the benefit of the debtors, and if they do not complain, no one else has a right to do so. Here the debtor came in a few days after the attachment issued, and confessed judgement and did not oppose the sale of the goods attached, which amounted to about \$ 40.

The motion is dismissed.

O'Neal and Johnston for the motion.

Bauskett and Dunlap contra.

A. KIRKPATRICK, vs. SAML. IRBY.

The act of 1813, which avoids any civil process served on any person "when he shall be called out *into service* or *imbodyed* by the executive authority, or within *thirty days* after such person *sho'l be discharged from the service*," applies *only* to those cases where the militia are called out to *actual service*, in a state of actual warfare, or an emergency of war; and not upon an occasion like the reception of Gen. Lafayette.

MICAHAH MARTIN, vs. JOHN QUATTLEBAM.

One tenant in common can not maintain an action to try titles against his co-tenant.

What is sufficient evidence to prove a deed where one subscribing witness *made his mark* and did not remember it, and the other witness not recollecting the fact either.

A deed of land is not affected in any way, by not being recorded, except as to subsequent purchasers from the same vendor, or as to subsequent creditors.

Trespass to try titles, tried before his Honor Judge Richardson, at Lexington.

The plaintiff produced a grant to the land in dispute to one Busbie, and a regular chain of title from Busbie down to Jesse Allen. He proved that Jesse Allen died intestate, in 1806, seized of the land, leaving a widow and four children. The plaintiff then produced and proved a regular paper title for the same land from the widow and *three* of the children of Jesse Allen deceased; but from William Allen, one of the children of Jesse Allen, the plaintiff did not pretend to have a title for his share. Plaintiff proved the location and trespass, and closed his case.

The plaintiff's right to recover was contested by the defendant, on the ground that he was a tenant in common with the plaintiff of the same land; and for this purpose he introduced a deed of conveyance for the whole land in dispute from William Allen to one Martin Witt. From Witt down to defendant, a regular chain of title was proved. The deed from Allen to Witt purported to have been attested by two

witnesses, Richard Allen and William Boatwright. Richard Allen proved that he saw the deed duly executed by William Allen, but does not recollect whether Boatwright witnessed it with him or not. William Boatwright, who could not write, was sworn, but he said, after such a length of time, he did not recollect to have witnessed the deed, and would not undertake to identify his mark, but remembered that, years ago, William Allen called at his mill with a paper. Nor did he recollect that he had proved its execution before a magistrate. The deed appeared on the back of it to have been proved by his oath, before a magistrate.

The plaintiff objected to the report being read in evidence, without better proof of its attestation by two subscribing witnesses, and on the ground that the deed had not been recorded, although executed in 1809.

The court overruled the objections, and directed the deed to be read, supposing it sufficiently proved, in as much as the plaintiff did not pretend any claim from Wm. Allen, and William Allen's rights were not in issue.

Upon this the plaintiff took a nonsuit with leave to set it aside, if the opinion of his honor the presiding judge should be incorrect as to the law on the subject.

COLCOCK, J.—It does not admit of a question that if the defendant has a title from one of the distributees of Jesse Allen, he is a tenant in common, and cannot be sued by the plaintiff, unless he had disseised him or kept him out of possession. Two questions then arise;

1st. Whether the deed of William Allen was executed in the presence of two witness? and

2ndly. Whether the deed should have been recorded?

From the report of the presiding judge, it appears that Boatwright does not swear he was not a witness; and all the circumstances of the case seem to shew that he was. Now it is very possible that any man, more particularly an illiterate one as he appears to be, may forget a transaction of this nature. But how could the magistrate have been mistaken.

There was nothing to contradict these facts. And the conclusion from them is irresistible, that there are two witnesses to the deed.

On the second question, it is not necessary to the validity of a deed that it should be recorded. Recording only becomes necessary in particular cases, when there are double conveyances. If the same grantor convey to two, he whose deed is duly recorded shall hold. The act says (1 *Brev.* 174) if it be not recorded, it shall not bar "the right of persons claiming as creditors, or under subsequent purchases, recorded in the manner herein before prescribed." That is, a subsequent purchase made from the same person.

But here the deed of William Allen to Witt, for his part, which alone he could convey, is the only deed he has made. It is not therefore necessary to the defendant's title in this case, that it should have been recorded. The defendant is not interfering with rights of the plaintiff. He can claim no other part or portion of the land than William Allen's share. The law never meant any thing so absurd as to say that if a man sold his land and made a title for it, which should not be recorded, that such title should be destroyed by another's making a title to the same land and having it duly recorded.

The motion is dismissed.

John Caldwell for the motion.

Harper, contra.

**WILLIAM BELL, vs. WILLIAM STROTHER and JOHN BUCH-
ANNAN, Executors of Woodward.**

The delivery of property, on the marriage of a child, is presumption of a gift, and will be considered as such, unless there be something to counteract the presumption, and this without regard to time.

This was an action of trover to recover the value of a negro woman called Sarah, and her three children, Jane, Charles and James, tried before Judge Gantt.

The plaintiff claimed under a deed of trust from John Bell, to himself, dated 15th January, 1813. By which deed the negroes in question were settled to the following uses: "To the sole use of Isabella Turner, the wife of William Alexander Turner, for life, with a limitation after her death to the children of that marriage." The execution of this deed was proved by Richard Watson and William Delany. It was done at the house of John Bell. The demand and refusal were admitted, and also that Jane, Charles and James were the children of Sarah, and that the value of the negroes sued for was \$ 975.

The defendants claimed, in right of Woodward, dec'd. as his executors, under a gift from the said John Bell to the said Isabella Turner, on her marriage with the said William Alexander Turner; and as her property, the negroes in question were sold under execution and purchased by the dec'd Woodward. The gift to Isabella on marriage was inferred from the circumstance of Sarah having been in possession of Turner for some years before the execution of the deed, and before she had children.

The question was submitted to the jury on the evidence, who found for the plaintiff the value of the negroes as admitted.

The defendant moved the court of appeals for a new trial upon the following grounds:

1st. Because the finding of the jury was without evidence, there not being a tittle of testimony to do away the legal effects of John Bell's suffering the negro woman Sarah to go into the possession of William Alexander Turner, his son-in-law, upon his marriage with his daughter.

2nd. Because the verdict of the jury was contrary to evidence, in as much as the circumstances under which the negro went into, and remained in the possession of Turner, were clearly demonstrative of a gift, and there was no evidence to the contrary.

3rd. Because the verdict of the jury was against law, as much as the right of the negroes having passed out of John Bell before the time of his executing the deed of trust, plaintiff therefore could prove no property in himself, as he claimed under John Bell, and was not entitled to a verdict.

Clarke for the motion.—The legal effect of John Bells suffering the negro to go into his daughters possession, on marriage, is the presumption of a gift. The negro remained five or six years in her possession, before the deed of trust was executed. What testimony is there to do away this legal effect. The deed of trust can have no effect, as it is not connected with the precedent transactions. In *2 Nott and Mc Cord 367, Foster vs. Cherry*, a deed drawn before delivery and executed afterwards, it was held that the gift was controlled by the deed. In some cases the jury might perhaps presume only a loan, where the parties are all poor and needing some small assistance. The deed of trust is accounted for, upon the circumstances of Turner's becoming dissipated and embarrassed in 1813, and he wished to secure the negro to his daughter. Woodward was a purchaser without notice. The deed of trust is not recorded. The negroes remained in Turner's possession. Perhaps the possession of the negroes caused credit to be given Turner. Woodward, being a creditor it was a fraud on him.

Glendenin contra.—There is no proof of an absolute gift, but a bare presumption arising from the possession. There was no admission on the part of John Bell. Presumptions may be rebutted by other presumptions. The declarations of Bell and Turner would have been good evidence for them, but not for us, yet no evidence has been offered to prove such declarations. Turner's acquiescence in the deed is a strong circumstance to rebut the presumption; besides the acquiescence of creditors whose debts existed at the time. Judgments remained unsatisfied while the property was in possession of Turner. None but creditors can take advantage of the statute of Elizabeth, and they must be creditors whose debts

existed at the time. A person may give, though in debt, if he leave enough to pay his debts. (*Kid vs. Mitchell*, 1 *Nott and Mc Cord* 334.) Woodward is in no danger of losing his debt. All of it is paid but \$150, which Mc Crory offers to pay. Besides he had notice of the deed. He owned he had heard of it before. But Turner had other property enough to pay all his debts. This is different from the case of *Brashears and Blasingame*, (1 *Nott and Mc Cord* 223.)

W. F. DeSaussure, said fraud was not in question. The only ground is, was there any sufficient evidence of an absolute gift? Chattels may be given by deed or words sufficiently proved, without delivery. Possession, sometimes presupposes delivery, but no case has been decided that mere possession proves delivery. No evidence how long Turner had possession before the deed. No proof of continued possession. Turner's acquiescence makes the deed as valid, as if he had made the title. In *Kid vs. Mitchell*, another person made the deed.

Clarke—There was no evidence that Turner knew of the deed.

Colcock, J.—In this case the motion must be granted. On the third ground, the verdict is directly contrary to the established doctrine of law. It has been repeatedly decided that the delivery of property on the marriage of a child, raises the presumption of a gift, and will be considered as such, unless there be something to counteract the presumption, and this without regard to time. (1 *Bay* 232. 2 *Nott and Mc Cord* 93.)

This is a stronger case in favor of the defendant than the case of *Winn and Irby*, (a) decided on Monday last; for here the possession was at least seven years antecedent to the deed of trust under which the plaintiff claims. Now such a possession even in a stranger, would have given

(a) This case I have not thought worth publishing, as the decision turned on circumstances of fraud, and very contradictory and irrelevant testimony. R.

him title, if not accounted for. The father-in-law, John Bell, had no property in these negroes when he made the deed, consequently could convey none. But even if the period of possession had been shorter, to have suffered such a deed to prevail, would be a fraud on the community. The defendant may have been, and I have no doubt from the facts of the case, was, credited on the faith of the property; and it is no answer to this to say that the particular creditor, Woodward, who forced a sale of this property, did not credit the defendant on the faith of it; for others might have done so; and the debt to M'Crory, and that to M'Cready, were contracted in 1807, after, as we are authorized to suppose from the testimony, the negro woman, the mother, came into the possession of the defendants; and their executions were actually paid out of the proceeds of the sale. It was said however, that, as Turner was supposed to be able in 1813 to pay his debts, the deed ought to be considered as his deed, and if it had been made by him it would have been effectual. Now there is no evidence to shew that the deed was made with the knowledge or consent of Turner. But if it had been actually made by him, I cannot think that it would have availed; though it is not necessary to determine that question.

The motion is granted.

Clarke for the motion.

Clendenin and DeSaussure contra.

SAML. MAVERICK vs. LEWIS & GIBBS.

Neither the plea of *nil habuit in tenementis, nil demisit*, nor *rien passer*, can be pleaded to covenant for rent on an indenture, for it operates as an estoppel.

But the estoppel only exists during the continuance of the occupation of the tenant; and if he be ousted by a paramount title he may plead it.

An outstanding title, alone, will not discharge a lessee by indenture. He must be evicted, or prevented from entering or from enjoying the thing demised, by virtue of such title; and he must set out the title in his plea, and shew particularly how it arises.

Where a person was in possession by an outstanding lease, and refused to give possession to the new lessee, it is tantamount to an eviction

No particular words are necessary to constitute a lease, but there must be an interest in the freehold conveyed. And an agreement to take charge of a farm and to work on shares is not such an outstanding lease, as will amount to an eviction, where the person in possession under such agreement refused to deliver possession to the lessee.

The plaintiff by indenture dated 15th February 1823, leased to the defendant his Montpelier plantation in Pendleton district, and a mill about a mile from the farm, together with the following negroes, to wit: Jack, (the miller,) Dave, Tom, Martin, Sally, Clarissa, Lucy, Hannah, Jinny, Conder, Ben, and three small boys, likewise the stock and other articles on the farm. The lease was to continue two years; but it was provided, that if the defendant should give notice in writing of his intention to quit on or before the 15th July then ensuing the lease should endure one year only. The defendant on his part covenanted to pay \$700 annually by way of rent.

This was an action of covenant brought for one years rent.

The defendant pleaded that before and at the time of the said demise the said tenements, negroes, and certain other personal property therein mentioned, were demised by the said Samuel Maverick to a certain Anderson Hunter who was then and there in possession of the same, and refused to deliver possession to the said Lewis & Gibbs.

The replication traversed the demise to Anderson Hunter, *modo et forma*, and on this issue the case went to the jury.

In support of his plea the defendant produced an agreement between Samuel Maverick the plaintiff, and Anderson Hunter in the following words:

"An agreement made between Sam. Maverick and Anderson Hunter, said Anderson Hunter agrees to take charge of Montpelier farm; attend to the horses, cattle, hogs, and all the stock thereon, and take under charge negroes

Dave, Hannab, Lucy, Jinny, Sally, Clarissa and Martin, to work in the fields, and Ben and the three little boys, Joe, Ben, and Cato, and Benbow to attend to the vineyard and the three other gardens, and in hauling every day, manure; sand, &c. into the gardens; and Conder to cook for the whole establishment; to use his best endeavors in making crops, provisions, and such other articles as may be agreed on, or thought most advisable. And should apples and fruit hit, he is to attend and make cider-royal as much as possible, to make peach brandy and to keep Ben or some one if possible to supply the market at Pendleton with fruit of all kinds; to keep an exact account of all money received for the same of every kind, to allow and pay Ben one dollar out of every sixteen dollars so sold, he Ben to pay six and a quarter cents out of each dollar he receives to the three little boys. To keep the vinyard locked and not to suffer visitors to pull the fruit or to touch the vines; but to see that Ben keeps the beds at all times made up light and nice, and the walks all scraped clean in the spring and summer. This agreement shall commence this day, and last for two years from the same. The said Saml. Maverick promises to allow to the said Anderson Hunter one fith of all the crop of corn, wheat, fodder, hay, and the same proportion of the money, which he shall receive for fruits of all kinds, cider, cider-royal and vegetables by him sold from the said farm. But should the said Samuel Maverick return before the summer after next, that it is intended that he the said Maverick shall take Ben and the three little boys under his own charge and the five gardens and vineyard for his own proper use of vegetables, grapes, &c.

Witness our hands this first day of January 1823. Said agreement is to commence on the 10th December last, say 1822.

R. A. Hunter,

Saml. Maverick.

The jury, under the charge of the presiding judge, found for the defendant.

A motion was now made for a new trial on the following grounds.

1st. Because the agreement between Maverick and Hunter, was a contract for the performance of personal services and conveyed no estate in the property contained in it.

2nd. If that agreement conveyed any interest it does not amount to a demise.

3rd. Anderson Hunter if he had any estate was a tenant in common with the plaintiff.

4th. The mill, Jack (the miller) and Tom are not embraced in the agreement with Anderson Hunter, nor did he exercise any control over them. The plea therefore was not supported.

Harrison for the motion.—The general rule that a lessee cannot dispute his landlord's title admits of some qualifications. A person may shew that he was never lessee by indenture; and may plead paramount title and eviction. He must set out the title that the court may judge. Let us examine the truth of the plea. The agreement with Hunter does not amount to a demise. It is a contract for personal services, and conveys no interest. (4 *Jac. Law Dic.* 95.) Demise and lease are synonymous. Demise conveys an exclusive estate, right of possession and profits; and if the agreement did not convey a right to the possession and profits it is no demise. The terms were to take charge of the negroes and to attend to stock, &c. So far from conveying property it excludes the idea. It appoints an agent, servant, or bailiff. He makes crops, not for himself, but for Maverick. He is not the owner but a mere receiver of a portion as a compensation for his services.

Only ground on which it is contended, Hunter had an interest, is that he was to receive one fifth. He does not pay Maverick, but Maverick him. It is truly an engagement on Maverick's part to allow him one fifth. He had not an interest even in the one fifth. He could not have taken in kind. If turned off he might have sued for breach of covenant.

Suppose the agreement was to pay him \$200. The amount of the crop only regulates the wages to be received. In *Stewart vs. Doughty*, 9 Johns. Rep. 108, property was leased and the owner reserved a share, the question was who was the owner, and the court said the lessee; because he was the paymaster. The interest in the soil passed. The interest in the crop was in the lessee till delivered, and that the lessee could maintain an action of trespass.

Another test is (1 Co. Lit. B. 1. C. 7. Sec. 58.) that a lease is assignable. • It is a lease if it conveys an interest in the soil and is assignable. Here the man was selected for his personal qualifications. Could he assign? So an executor of a lessee may enter. Could he in this case enter and carry on the contract?

Again who to provide supplies, &c. for the farm? Maverick. Because he was the owner.

But the clause "take Ben and gardens and vineyard" is a resumption of a trust *quoad hoc*. But still it is a personal contract. In the agreement with Gibbs, the contract with Hunter is recognized, and Gibbs stipulates to allow the same.

No form of words is necessary, if the intention appears to transfer possession and profits.

If he has any interest it must be as a joint tenant Maverick is in the legal possession. If he be a tenant in common the plea is not supported. (*Stephens Civil Pleading* 338.) Title pleaded must be proved as pleaded. (*Ib.* 213. *Archbold Civil Plead.* 368–376. 2 *Saund.* 97. 1 *Lord Raymond* 404.)

The defendant has pleaded that the whole property had been demised to Hunter. The agreement shews that it is not so. The defendant must prove the whole or the plea is not supported. (*Stephens on Plead.* 107. *Archbold* 368. 1 *Phillip's Evi.* 165.)

W. R. Davis, contra.—It is not pretended that Mr. Maverick has suffered damages. He claims the whole rent, while Hunter remained in possession. It is insisted that the

plea contained too much. The agreement was not in the possession of the defendant. It was formed on the information of Hunter. The lease is not set forth in the declaration. No other plea could be used, than a special one, negating the declaration. The whole house was leased. Would any one take one on such terms? If Hunter could not be removed how could Maverick put Gibbs into possession? If this plea be not good, none other would have been sufficient.

Harrison in reply. The only question is whether the plea is supported? *Meverick* could have turned off *Hunter*. If so *Gibbs* had the same right. The lessor is bound to put the lessee in possession. If he suffer himself to be kept out, by a wrong doer, he must take the consequences.

Colcock, J.—Neither the plea of *nil habuit in tenementis*—*nil demisit*, nor *rien passa* can be pleaded to covenant for rent on indenture; for it operates as an estoppel; but the estoppel only exists during the continuance of the occupation of the tenant; and if he be ousted by a paramount title he may plead it. As a lessee by indenture cannot plead *nil habuit in tenementis*, it follows that an outstanding title alone will not discharge him. He must be evicted, or prevented from enjoying the thing demised, by virtue of that title; and he must set out the title in his plea, and shew particularly how it arises.

The defendant has pleaded a paramount title, and alleges that the person having that title was in possession and refused to deliver up the possession. If the plea be true, it affords a sufficient bar; for the possession of the person having title and his refusal to deliver up the possession is tantamount to an eviction. (*Story's Pleading*, 170—note and authorities.) It is not necessary for the plaintiff to allege entry. On an indenture the rent is due on the lease and not on the occupation, (2 *Chitty's Pleading*, 194, n. 1 *Saund*, 03, n. 1 *Com. Dig. Tit. Pleader*, 2 w 14, *Doug.* 455, and the lessee is liable for rent without occupation. (3 *Term Rep.* 441, 442) Eviction suspended the rent. (1 *Selwyn's N. P.* 539.)

It is not necessary in this case to follow the learned counsel through all the arguments and authorities which he has produced, to shew that the contract of Maverick with Hunter was not a lease. It is clear that no particular words are necessary to constitute a lease, but there must be an interest in the freehold conveyed. Now here was an express contract for the personal services of Hunter, giving him no interest in the soil; and had he died his executor would have had no power to enter. There would have been an end to the contract. He was to take charge of the farm and manage it in the best manner. There is no stipulation that he shall live on it, or be bound in provisions; much less that he shall exclusively occupy any part of it. His intrusion was illegal, and the lessee, Gibbs, had the same right to expel him from the house, as if he had been a stranger.

The plea of the defendant can not therefore be supported. It would be allowing the misconduct of Hunter to injure Maverick, which the law will not permit. In such a case as the present, nothing but an outstanding paramount title would have availed the defendant. Again, the defendant took the lease with a knowledge of Hunter's situation, and agreed to find him with provisions, so that if his right had been such as legally to conflict with the defendants, it might have been doubted whether the defendant could have taken advantage of the circumstance. It was certainly an improvident bargain, and attended with unpleasant circumstances, but that does not warrant the interference of the court. There must be a new trial.

The motion is granted.

Harrison for the motion.

Davis and *Earle* contra.

HALE Assignee vs. SCHULTS et. al.

A sheriff may assign a bond given to him as sheriff, for property bought under an attachment sale; and the assignee may bring the action in his own name, as assigner.

Wherever a bond is drawn to one and his assigns, by the law of the contract it is assignable.

Though the indorsement was in blank and filled up, after suit was brought, it is good.

Tried before Judge Richardson.

This action was brought on a bond given to the sheriff of Edgefield district, and assigned to plaintiff. The bond was given for the price of some negroes sold by the sheriff under an attachment. It was proved that before the commencement of the action, Belcher endorsed the bond in blank, and that the words assigning the bond to plaintiff were written long after.

His honor overruled a motion for a nonsuit which was now renewed.

1st. Because a blank endorsement by the sheriff is insufficient to transfer the interest in a bond.

2nd. Because the bond being given to the sheriff as a public officer, he had no power to assign it.

COLCOCK, J.—The first ground in this case being abandoned, having been settled by the case of Stanly and McNeil, it is only necessary to notice the second. It is said the bond was given to Belcher as sheriff, in some official transaction and that he ought not to be permitted to assign it; for if he be permitted, frauds may be practised on the community.

In the first place, it does not appear on the face of the bond, that it was given in any official transaction. The words sheriff, &c. may be a mere description of the person. But if it were so given, there is nothing in the law, nor can I perceive any thing in the reason, which has been assigned to prevent the assignment of such a bond, as well as any other. The ground taken is, that he has no power to assign. Now

where a bond is drawn payable to one and his assigns, as is the case here, by the law of the contract it is assignable.

If the objection was intended to go to the form of the action, and the counsel mean that the suit could not be maintained by the assignee, the answer is, that the act of 1798 expressly authorizes him to bring an action in his own name styling himself assignee, which was done.

The motion is dismissed.

Butler and Thompson for the motion.

F. Wardlaw, contra.

TOWNSEND vs. COVINGTON.

The subscribing witness to a contract, whether under seal or not, must in all cases at common law, be produced if alive, and *within the jurisdiction of the court*.

The act of 1802, is confined to bonds and notes, and, as to them, dispenses with the attendance of the subscribing witness, unless the defendant swear the bond or note was not signed by him, or, in the case of an executor or administrator, that he believes it is not the signature of their testator or intestate.

Tried at Marlborough before Judge James.

This was an action of assumpsit to recover the consideration money agreed to be paid for a tract of land. The plaintiff's counsel offered to prove the hand writing of defendant to a written agreement for the sale of land not under seal, by other testimony than the subscribing witnesses. Evans, for the defendant, moved for a nonsuit, on the ground that the act of 1802 dispensed with the attendance of subscribing witness only in the case of bonds and notes, expressly mentioned, and that as to other contracts the common law remained of force; and the court being of that opinion ordered a nonsuit.

From this opinion the plaintiff's counsel appealed, on the ground that his honor was wrong in refusing to admit evidence to prove the handwriting of the parties to a written

agreement *not under seal*, for the sale of land and payment of money by other than the subscribing witnesses.

COLCOCK, J.—The point now submitted to the consideration of the court has been determined within the last four years, but as the case is not published and can not be referred to, the court again express an opinion. The common law rule which requires the attendance of the subscribing witness, if to be had, is imperative, and the witness must be produced if alive and within the jurisdiction of the court. The act of 1802 is confined to bonds and notes, and as to them, dispenses with the attendance of subscribing witnesses, unless the defendant will swear the note or bond was not signed by him. (2 *Faust*, 454.) This act is in derogation of the common law rule, and therefore must be confined to the particular cases therein enumerated. The case before us is not embraced in the act, and therefore the testimony was inadmissible.

The motion is dismissed. (a)

Ervin for the motion.

Evans, Solicitor, contra.

(a) See the cases collected in *Metcalf's Ed. of Starkie on Evidence*, 1 vol. 330 to 342. The cases from the different states are collected in the notes. From the English cases it appears, if the witnesses are absent from the state or beyond the jurisdiction, it is only necessary to prove the hand writing of one attesting witness. (*Adams vs. Ker*, 1 Bos. and Pul. 360. *Prince vs. Blackburn*, 2 East. 250.) But there is said to be a distinction between the case where a witness is dead, and where he is living, but beyond the jurisdiction. In the latter case it was held that the proof of the hand writing of the obligor was necessary. (*Hill vs. Unell*, 3 Maddock's Rep. 370.) But *Starkie* says, page 340, that it is usual to prove the hand writing of the attesting witnesses, as well as that of the obligor, where the absence of the witnesses is sufficiently accounted for.

In *Coghland vs. Williamson*, Doug. 93, it was held, in the case of a bond, where a witness had gone to the East Indies, sufficient to prove the signature of the obligor. The case of *Adams vs. Ker*, above cited was the case of a bond. In *Barnes vs. Trompowsky*, 7 D. and E. 261, in the case of a charter party under seal, the court required proof of the hand writing of the witness, who was in Russia, as well as the signature of the contracting party (See also *Wallis vs. Delancey*, Ib. 262, note (c.) where Lord Kenyon required proof of the signature of the obligor, as well as that of the witness. But

upon reference to the cases the reader will find that the courts have often varied the general rule, to meet the circumstances of cases, under another general rule, that the law can only require the best evidence which the nature of the case admits of.

See what *Enquiry* is sufficient to be made for the absent witness to admit proof of hand writing. (1 *Starkie on Evi.* 338-340, and note (1.)

So, where a witness has subsequently become interested, proof of his hand writing is sufficient. (*Cunliffe vs. Sefton*, 2 *East*. 183. 1 *Str.* 34. 1 *P. W.* 289. *Swire vs. Bell*, 5 *T. R.* 372. *Whittemore vs. Brooks*, 1 *Greenleaf's Reports* 57.)

So where a witness has since been convicted of forgery. (*Jones vs. Mayson*, *Str.* 833.)

In South Carolina, by act of 1802. (2 *Faust* 453. 1 *Brev. Dig.* 319,) where the witness to a bond or note shall be absent, the signature of the bond or note may be proved by other testimony, unless the defendant on filing his plea swear that the signature is not his. And in case of an executor, or administrator defendant, he must swear that he has cause to believe the signature not to be that of his testator or intestate.

In *Hopkins vs. Alberton*, 2 *Bay* 494, it was held that in case of a will of lands it was necessary to prove the hand writing of all three of the attesting witnesses, who were dead, to satisfy the statute of frauds. In the same case the hand writing of two witnesses to a deed of lands, and the signature of one of the grantors being proved, the court held it sufficient to go to the jury under the circumstances, the signature of the other grantor, not being proved, she being an old woman not accustomed to write. But in *Dunkin vs. Beard*, 2 *Nott and M'Cord* 400, it was held that where the subscribing witnesses to an old will, thirty years old, are dead, and no proof of their hand writing can be obtained, it will be sufficient to prove the signature of the testator.

In *Cornniell vs. Bickley*, 1 *M'Cord* 466, the court held it necessary to prove the signatures of both witnesses and the grantor, where they are out of the state or dead.

In *Phunkett vs. Bowman*, 2 *M'Cord* 138, the court held, that where the subscribing witness to a bond is dead or out of the state, the proof of the signature of the obligor, as well as of the signature of the witness was necessary. It is somewhat surprizing that this decision should have been made without any reference to the act of 1802. It was not meant as a construction of that statute; and must therefore be considered as having been made upon the principles of the common law, by some mistake, overlooking the act of 1802. (2 *Faust* 453.)

Where the maker of a promisory note only makes his mark, proof of the hand writing of the absent subscribing witness is sufficient. (*Buxey vs. Whitaker*, 2 *Nott and M'Cord* 374.)

What is a sufficient absence, see (1 *Starkie on Evi.* 338, and note (1) 340, and note (1.)

Acknowledgements, of the grantor or obligor are inadmissible. (1 *Starkie* 330-340. note (b.) see *Cunliffe vs. Sefton*, 2 *East* 183. R

WILLIAM HALL et al, vs. GEORGE JAMES.

The declarations of a person who has taken possession of land and held it for five years, may be given in evidence to shew in what right he held, whether in his own right or as tenant. (a)

But a man's loose declarations will not be suffered to prevail against the truth of the case as ascertained on the trial.

Where a man's rights depend on his acts, his declarations may be given in evidence to shew the nature of those acts.

Trespass to try title, tried before Judge GANTT.

COLCOCK J—It appeared that the defendant went into possession of a portion of the land, within the Lehre grant, in 1813; that in 1817 Alston, the surveyor, went on the land to survey it for Lehre, at which time one Gandy was in possession, also, within the Lehre lines, and that he had taken possession with an intention to purchase from one Pool. But when he ascertained from Alston's survey, that the land was Lehre's, he agreed to become the tenant of Lehre, and he remained on the land with that intention until 1820, when he obtained a written lease. James, the defendant, often told him he did not mean to claim the part which he had cleared within Lehre's lines, that it was not worth a suit. Under these circumstances it was contended that the defendant had established a title by possession. His grant being junior to the plaintiff's, it was not pretended that he could hold, except by possession. It was said, he was in, from 1813 to 1820, which being more than five years, gave him a title. But to this there were two objections:

1st. (Omitted—merely depending on fact.)

2nd. The admissions by the defendant that he did not claim the land.

To this objection it was said that a man's loose declarations will not be permitted to affect his rights. Which is true to a certain extent. What a man would say, in relation to his title or legal right to an estate, would not be suffered to prevail against the truth of the case, as

(a) See *Harrington vs. Wilkins*, 2 M'Cord, 289, and *post*, note to *Coate vs. Spear*, No. 25, 26.

ascertained on a trial; but when a man's title is to depend on his acts, his declarations will be permitted to shew the nature of those acts to give character to them. Now a possession to give title, must be an adverse possession, and if one should be permitted to give in evidence a possession of five years, while he had been constantly declaring that such possession was not intended as an adverse title, it is obvious that he would be permitted to deprive another of his property by a deception. No one is disposed to go to law without some absolute necessity. A man then might be disposed to suffer another to remain on his land as long as he declares he does not intend to hold adversely. He is to be considered as a mere tenant at will.

Motion dismissed.

Peareson and Nott for the motion.

Gregg and Hunter contra.

HENRY D. ATKINSON *vs.* WILLIAM ANDERSON.

Where a grant calls for another tract of land as a boundary, it must follow the lines of the tract so called for, no matter how zigzag; and the fact of the plat representing such line as a straight line, the same not having been closed, can make no difference. The same rule applies to natural boundaries.

It is the actual boundary and not the false representation of it on the plat which must govern.

There is no more propriety in stopping at the first point which is presented, and from thence running a straight line, than there would be in going to the most distant one, which is to be found in any of the angles of the boundary, and running a straight line from that.

This was an action of trespass to try title.

The Reporter deems it unnecessary to publish any thing more than the opinion of the Appeal Court.

COLCOCK, J.—In this case the only and the simple question submitted to the consideration of the court is, whether the actual boundary line called for by the plaintiff's

grant shall control the location or a representation of that boundary line made by the surveyor in his original plat without having made any actual survey of such boundary?

In locating the land the surveyor ran three of the lines, and then called for the plantations of George Cooper, John Gamble, I. E. James, Tombleson and William Anderson, as his north western boundary; and presuming that these plantations would present a straight line as a boundary, he so represented it on his plat; but so far as regards the plat it was a mere imaginary line. The boundary as it really exists must of course govern, and all the land within it however much it may meander, belongs to the grantee. There is no more propriety in stopping at the first point which is present and from thence running a straight line, than there would be in going to the most distant one which is to be found in any of the angles of the boundary, and running a straight line from that. There is no principle that will apply to the one which will not support the other. The consequences in either mode of location would involve difficulties which at once shew their incorrectness. The former mode, which has been pursued by the jury, contradicts the grant and greatly impairs the value of the grantees land, by leaving all the little angles made by the indented course of the boundary, on his side, vacant, and the latter would invade the rights of others. Suppose this had been a natural, instead of an artificial line, a river for instance, would it have been thought of, that any one point or projection of its bank should have been supposed to bound the grantees right more than another and more distant one? I presume not. The boundary called for must be pursued, as it is found, regardless of any misrepresentation which may have been made of it. It is the boundary and not the representation which is to govern.

The motion is granted.

Stephen D. Miller for the motion.

W. F. De Saussure, contra.

**E. LYLES, *Ordinary*, vs. JAMES CALDWELL, MOSES COWLY,
and ROBERT COWLY.**

In debt on an administration bond, against the administrator and *security*, a decree obtained before the ordinary against the administrator, may be given in evidence to shew the amount of damages. The *security* was not summoned when the administrator was called to account.

It is not necessary to summon the *security* to an administrator, bond before the ordinary, where the administrator is called to account.

Tried before his Honor Judge Gantt.

This was an action of debt in the name of the ordinary of Chester district, on an administration bond. James Caldwell and Moses Cowly were the administrators, and Robert Cowly the *security*.

The defendants pleaded the general issue and performance. Replication, to the second plea, that J. Caldwell and Moses Cowly, administrators, had been cited before the ordinary to account, and set out a decree against them.

The defendants demurred specially to the replication, because Robert Cowly, who had been sued jointly with the administrators, had not been made a party before the ordinary, neither was there any decree against him &c.

The court overruled the demurrer.

Defendants then moved for a nonsuit, because the decree against the two defendants could not be given in evidence to charge Robert Cowly, who was not a party.

The motion was overruled.

Defendants now moved the court of appeals for a nonsuit:

Because the decree offered was not sufficient to support the action.

COLCOCK, J.—The counsel, for the appellant Robert, contends that he ought not to be made liable, because he was not summoned before the ordinary. That this was not a sufficient ground of demurrer, it is only necessary to refer to the contract, and to shew the nature and extent of the undertaking of the parties to determine it: The ordinary agrees to

place in the lands of the administrator, the goods chattels &c. of the deceased person to be by him well and faithfully administered, and the administrator and *his security* undertake, that he the administrator shall make a just and true account &c. whenever required by the ordinary, and pay over &c. Now the administrator is the person who is cognizant of all the affairs of the estate. The security is not supposed to know any thing about the accounts. The security is not required to go before the ordinary. He knows that he can not be made liable, until his principal has been called to account to pay over and a decree to that effect is made by the ordinary. His contract then is made with reference to all this. Why then should he be called before the ordinary when his principal is? There is nothing in the letter or spirit of the contract which seems to require it.

The ground of demurrer was insufficient and the demurred was properly overruled.

But the counsel for the defendant contends that the decree offered was not sufficient to support the action.

The counsel have certainly misconceived the purpose for which the decree was introduced. It is not made the basis of the action. The action is founded on the bond; the breach of which is assigned, and the decree introduced to establish the amount of damages. The condition of the bond is, that the administrator should account &c. whenever called upon, and to pay &c. when a decree should be made. The decree proves that he was called on and has not performed, and, thus, proves the breach assigned. He did not contest the legality of the decree, nor allege that it was obtained by fraud; nor did he contend that he could in any manner shew the amount decreed was not due, or that he had a right to do so. Such a decree certainly is at least *prima facie* evidence of the sum due, and not being in any manner controverted, was properly considered in this case as conclusive. The motion is dismissed.

Clendinen for the motion. *Wood contra.*

SAMUEL SPEER, *ads.* MARY COATE.

The declarations of deceased persons, who shall appear to have been in a situation to possess the information, and not interested, are admissible, on questions of boundaries; as the declarations of surveyors, chain carriers &c. But if the declarations are made *post litem motam* they are inadmissible, unless they are the repetition of the same declarations made before suit.

This was an action of trespass to try titles. Tried before his Honor Judge COLCOCK.

The plaintiff's grant was the elder one, and if it covered the land in dispute the plaintiff was entitled to a verdict. To close the plaintiff's grant by course and distance it would not cover the land in dispute. Two corners of the plaintiff's land were established, and to close from these the land was the defendant's. But the plaintiff contended, that a gum-tree corner on the bank of Bush river was the corner of her grant; and if that was established, then, that her grant would cover a part, if not the whole, of the land in dispute. But to set out at the pine corner and run out the land as far as marked, and pursue the course, it would never arrive at the gum, it being a considerable distance out of the course; besides the distance of the line would not reach the gum corner by at least one half of the land in dispute. The gum corner was cut out by the surveyors, and by the growth of the tree counted twenty years younger than the plaintiff's grant. To close from the gum corner according to the course would cross Bush river and make the closing line nearly half a mile too long. Bush river was not noticed in the original survey. To close agreeably to the lines contended for by the plaintiff, from the gum, not only was contrary to the course and distance and figure of plaintiff's plat, but was unsupported by a single marked tree, although two corners intervened, according to the plaintiff's plat. The plaintiff offered to prove, that a certain William Golding (deceased) had said he was a chain carrier at the time of the original survey and that the gum was the corner then made. This testimony was objected to as inadmissible upon general principles, besides being made

after the commencement of a suit between the present defendant and the plaintiff's devisor. His honor permitted this testimony to be given. A witness, Marmaduke Coate, said, while a former suit was pending for the land in dispute, the deceased, Golding, came to the house of the plaintiff's devisor and he was sent for to see him point out the gum corner. When he went he found the plaintiff's devisor and William Golding at the gum corner. Golding then said, that was the corner of the original survey, and that they run a straight line from that corner to the pine corner on the defendants land. This line would leave out about half of the land in dispute, and the defendant's trespass would be on his own land. Other witnesses said they had heard Golding say that the gum was the corner. Mr. Neil, said that for about twenty years the plaintiff's devisor, William Coate had, claimed the gum as his corner. Mr. Chandler said his father, forty years ago, had said the gum was Coate's corner.

On the part of the defendant it was proved that Golding was a man of light and suspicious character, that the plaintiff's devisor was his brother in law, and that thirty or forty years ago the land was regarded as vacant. By Bowell, the defendants grantee, it was proved that Coate knew of the survey, and at first he set up a claim and afterwards abandoned it. The land had passed through several hands and had been once sold at sheriff's sale, and Coate had never made known any claim, until about three or four years ago. His Honor charged the jury that if they believed the gum corner to be the plaintiff's corner they might find the whole of the land for the plaintiff, and he expressed a strong opinion to them that that should be their verdict.

The jury found for the plaintiff, the land in dispute and four dollars damages.

The defendant appealed and moved the constitutional court for a new trial.

1st. Because His honor erred in admitting the statements of William Golding to be given in evidence.

Bausket and *Dunlap*, against the motion, cited *Phillips's Ev.* 184. The declarations of a dead person, who surveyed the land are always admissible. (6 *Binney Rep.* 59.) Hearsay admissible to prove boundary. (2 *Haywood's Rep.* 349.)

O'Neal and *Johnson*, contra. Declarations have never been admitted to affect private rights. (*Phillips Ev.* 184.)

Colcock, J.—This case is put entirely on the ground that the declarations of *Golding* were inadmissible, and consequently that a new trial must be granted.

It cannot be doubted at this day that the declarations of deceased persons who shall appear to have been in a situation to possess the information, and are not interested, shall, on a question of boundary, be received in evidence. The exception, if made *post litem motam*, seems to have been also generally adopted, but could only have originated in that extreme caution which it was deemed necessary to observe in the application of a rule which is opposed to the general principles laid down on the subject of evidence. For if a man made false declarations with a view to affect a suit then pending, he must have also resolved on one of two things, either to die before the cause should be tried, so that his declarations might be given in evidence, or he must have determined to attend and perjure himself. Both are rather inconsistent with the nature of man. But when declarations made after suit brought are only a repetition of the same declarations made years before, the reason of the rule not applying, the rule itself cannot apply. *Golding's* declarations to some of the witnesses were made after this suit was brought. But *Chandler* says he made the same declarations forty years ago, even before the defendant had obtained the grant under which he claims. They could not of course have been intended to produce any effect in this case.

The difficulty as to closing the lines was for the determination of the jury and was left to them. No rule on the

subject has been violated, that we are aware of, and therefore the verdict must stand.

The motion is dismissed. (a)

O'Neal and Johnson for the motion,
Bausket and Dunlap contra.

(a) The following heads may be made, when *Declarations* (or *Hearsay*) may be given in evidence, viz:

1st. In all cases against a party making them or his privies. Even so of a plaintiff on record, though he be only a trustee. (*Baerman vs Rodemus* 7 T. R. 663. 1 *Starkie Evi.* 29.)

2nd. In cases of Boundary.—See *Jackson vs. Vedder*, 2 *Caines Rep.* 210. *Howell vs. Filden*, 1 *Har. and M'Hen.* 84. *Bladen vs. Cockey*, *Id.* 230. *Redding vs. Maccubbin*, *Id.* 368. *Long vs. Pellett*, *Id.* 531. *Gervin vs. Meridith*, 3 *N. Car. Law Rep.* 636. *Rives vs. Middleton*, 2 *Har. and M'Hen.* 414. *Weems vs. Disney*, 4 *Har. and M'Hen.* 156. *Smith vs. Walker*, 1 *N. Car. Law Rep.* 514. *Nichols vs. Parker*, 14 *East* 331. *Goodright vs. Moss*, *Cowp.* 594. *Berkeley Peerage*, 4 *Camp.* 401. *Banbury Peerage*, 2 *Sel. N. P.* 684. 1 *Starkie on Evid.* 60. *Davis vs. Pearce*, 2 *Term. Rep.* 63. *Caufmans case*, 6 *Binney* 59. But see 1 *M. and S.* 688-689. and *Reed vs. Jackson*, 1 *East* 257. These two latter cases, say that reputation is evidence with respect to public rights claimed, but not with respect to private rights. See note (a) to 3 *Starkie on Evid.* 1207. The distinction is, where the claim is a public one, as a boundary between parishes, or manors, or customary rights, &c. declarations as to the common opinion of the place, or general evidence of reputation, may be given in evidence; but not so where the claim is private. In the latter case the declarations must be made by one in a situation to know. (1 *Starkie* 59-60. *Phillips* 184.)

3d. In cases of Prescription and customary rights and matters of a public nature.—2 *Starkie on Evid.* 59, 60. *King vs. Inhab. of Erinwell*, 3 T. R. 708. 3 *Starkie* 1207. *Buller N. P.* 295. 1 *East Rep.* 345. *Peake Evid.* 11.

4th. Pedigree.—Including births, marriages, deaths, heirship and bastardy. See *Ross vs. Cooley*, 8 *Jahn. Rep.* 128. *Pancoast vs. Addison*, 1 *Har. and J.* 356. *Briney vs. Hann*, 3 *Marsh.* 326. *Id.* 550. *Chipman vs. Chapman*, 2 *Conn. Rep.* 347. *Jackson vs. Browner*, 19 *John. Rep.* 37. *Goodright vs. Moss*, 1 *Cowp.* 591. 1 *Dall.* 14. 2 *Dall.* 116-7-8. 3 *Starkie on Evid.* 1099.

5th. As to Character; to shew the moral character and conduct of a person, or that he holds an office or fills a particular situation.—1st. To afford presumption of guilt. 2nd. To affect the damages in a particular case. And 3rd. To impeach or confirm veracity. (1 *Starkie on Evid.* 59. 2 *Starkie* 364.)

As to a 6th. Pauper's Settlement.—This head is rendered doubtful by the cases. See *King vs. Erinwell (Inhab.)* 3 T. R. 707. *Rez. vs. Trystone Inhab.* 2 *East.* 63.

7th. Where the acts of a person can be given in evidence for him, his declarations, in relation to such acts, are also proper evidence; as in the case of a claim, demand or tender. (*Shenck vs. Hutchinson*, 2 N. Car. Law. Rep. 423. *Robertson vs. French*, 4 East 140. *Amery vs. Rogers*, 1 Esp. C. 209.

8th. Declarations or entries forming a part of the *res gesta* (1 *Starkie on Evid.* 47-48. So when the nature of any particular act is questioned, a contemporary declaration by the party who does the act is evidence to explain it. (*Ib.* 46. *Lord George Gordons' case*, 21, *Howells State Trials*, 542. *Digby vs. Steedman*, 1 Esp. Rep. 123. *Torringtons case*, 1 Salk. 285.) The evidence is not admitted on the credit of the person making them, but from its connexion with the circumstances, (1 *Starkie* 48,) and might be admissible even though the declarant, in ordinary cases, would not be believed upon his oath. And I would say even in cases, where his evidence would be incompetent. As in the case of a slave, in some cases of warranty on a sale &c. his declarations, as to his pains or illness, accompanied with acts, might be admitted in evidence. (See *Harper's Reports*, 38. and note.) So as to a wife, her declarations as to the state of her health, in answer to enquiries, were admitted, in an action on a life insurance of the wife, to shew fraud on the part of the husband. (*Avesson vs. Kinnaird*, 6 East 188.)

9th. Statements made in the presence and hearing of a person against his rights, which he does not deny or contradict. 1 *Starkie's Evid.* 50. 2 *Exp. N. P.* (under Evidence) 519

10th. So declarations of a person in *extremis*, in all Criminal Cases, if he be not a convict and would have been a competent witness if alive, though in the absence of the person to be affected by them. (*Woodcocks case*, 2 *Leach*. 567. 7 *John. Rep.* 95. 1 *Starkie* 101. For the reason of this rule Stakespeare has been quoted:

"Have I not hideous death within my view,
Retaining but a quantity of life;
Which bleeds away, even as a form of wax
Resolveth from its figure 'gainst the fire?
What in the world should make me now deceive,
Since I must lose the use of all deceit?
Why should I then be false; since it is true
That I must die here, and live hence by truth?—*King John A. V. 3. IV.*

These declarations must appear to have been made under an impression of ensuing death. The court, not the jury are to judge of the competency of the evidence, as to the impression of dying. (1 *East. C. L.* 358-360.)

11th. Declarations of a person in *extremis*, in some Civil Cases have been admitted. The confessions of an attesting witness to a deed that it was forged, made in *extremis*, are evidence to destroy the deed. (*Durham vs. Beaumont*, 1 *Camp. Rep.* 210-211. *Clymer vs. Littler*, 3 *Burr.* 1246-1255. 6 *East* 195. *Gilb. Evi.* 140. *Peake* 126.) So, the declarations of the wife, as to the state of her health, made when very sick, where admitted against the husband, in a suit brought by him on a policy upon her life. (*Avesson vs*

Kinnaird, 6 East Rep. 188.) But this case seems to fall more properly under the rule of its being a part of the *res gestæ*.

12th. Confession of crime when another is indicted.

So confessions, in *extremis*, that the person himself had committed a forgery of which another was indicted, is admissible. (*Amyer vs. Lillier*, 1 W. Black. Rep. 345. 6 East 195. So, I should think, that where a person comes forward, and confesses the crime, and surrenders himself to justice, such confessions would be admissible evidence for a prisoner accused of the same offence.

13th. On a feigned issue to try the fact of adultery, the confessions of the wife, connected with other proofs, are admissible, when no fraud or collusion appear. (*Doe vs. Roe*, 1 John. Cases 28.)

14th. What a party said may sometimes be evidence in his favor, as part of the *res gestæ*. As what a party or his wife swore in the criminal suit, may be given in evidence, in an action for malicious prosecution, to repel imputation of malice. (6 Mod. 218. Buller. N. P. 15.) So what a party said upon taking possession of land, to shew the interest he claimed. (1 John. Reports 159.) Or in the case of a tender, &c. (*Aversen vs. Lord Kinnaird*, 6 East 188.) So letters written by a public agent, cotemporary with the transaction, have been held proper evidence for him. (*Bingham vs. Cabbot*, 3 Dall. 39.)

15th. In Reply, evidence of what a witness said before the trial, in corroboration of his testimony. This rule has been doubted. (1 Mod. 283. Buller 294. Gilb. Evid. 150. 4 Hawk. P. C. c. 46, s. 48.) But it seems the credibility of the witness should first be attacked. (3 Douglass' Election Cases 78.)

16th. If A. refer B. to C. for an answer or information on any business what C. says is evidence against A. (*Williams vs. Jones*, 1 Camp. Reports 264-266.

17th. The admissions of agents are competent evidence against the principal, as to the business of the agency, and within the scope of his authority. (*Emerson vs. Blonden*, 1 Esp. Cases 142.) So admissions by an under sheriff are good against the sheriff. (1 Lord Raymond 190. Bull. N. P. 66. North vs. Miles, 1 Camp. 389. *Idem*. 391. note.)

18th. Public Documents, made under lawful authority, gazettes, proclamations, public surveys, records, commissions and other memorials of a similar nature, form an exception to the general rule, against hearsay. (1 Starkie 47, 172.) As to what is a sufficient proof of these documents, see 1 Starkie 181.

19th. What commences by parol may be transmitted by parol, and that creates a general reputation; in which case hearsay is admissible. (2 Esp. N. P. Tit. Evidence 523.) So a parol partition of lands is valid, and parol proof will be received. (*Jackson vs. Harder*, 4 Johns. Rep. 212.

20th. As to the nature of evidence which may be placed under the head of hearsay, besides those enumerated in No. 18, are recitals in deeds, wills, special verdicts, or bills in equity, stating a pedigree &c. inscriptions on old

grave stones, Heralds Books, and entries in family bibles, &c. (*Johnson vs. Pembroke*, 11 East 506. *Buller N. P.* 233. *Taylor vs. Cole*, 7 T. R. 3. *Stephens vs. Moss*, Coup. 691. *Bowby vs. Young*, 13 Ves. 144.) As to recitals generally, see 2 Starkie 29.

21st. *Res inter alios acta*, are sometimes admitted, as a fact connected with the matter in dispute, or as part of the *res gestae*; (1 Starkie 62-300 2 Starkie 29; as entries made by a party against his own interest at the time, who is since dead. (*Stead vs. Heaton*, 4 T. R. 669. *Barry vs. Bibbington*, 4 T. R. 514. *Higham vs. Ridgeway*, 10 East 109. *Searle vs. Barrington*, *Strange*, 826.)

22d. The Declarations of a voter may be given in evidence, to set aside the election; as to diminish the poll, by taking an incompetent vote-off, or to prove bribery, &c. but they are not admissible on a charge against the candidate for bribery, &c. They are admitted to annul votes; but not to set aside the election by *disqualifying* the member on account of his bribery &c. See the case of *Milborne Port*, 1 Doug. *Election Cases* 67. Case of *Ivelchester* 3 Doug. *Election Cases*, 76. *Petersfield Case*, 3 Doug. *Election Cases*, 6. *Worcester Case*, 3 Doug. do. 129. *Shaftesbury Case*, 3 Doug. 150.

In this last case, "Money to the amount of several thousand pounds, had been given among the voters, in sums of twenty guineas a man. The persons who were entrusted with the disbursement of this money, and who were chiefly the magistrates of the town, fell upon a very singular and very absurd contrivance, in hopes of being able thereby to hide through what channel it was conveyed to the electors. A person, concealed under a ludicrous and fantastical disguise, and called by the name of Punch, was placed in a small apartment, and through a hole in the door, delivered out to the voters, parcels containing the twenty guineas; upon which they were conducted to another apartment in the same house, where they found a person called Punch's secretary, and signed notes for the value, but which were made payable to an imaginary character, to whom they had given the name of Glenbucket. Two of the witnesses, called by the counsel for the petitioner, swore that they had seen Punch through the hole in the door, and that they knew him to be one Matthews, an alderman of Shaftesbury, and, as the counsel for the petitioner had endeavored to prove, an agent for the sitting members.

"On the part of the petitioner, witnesses were called to prove declarations of voters, who at the poll had taken the bribery oath, that they had received Punch's money. This was objected to by the counsel on the other side; but, the evidence was admitted."

23d. Written memoranda and entries by a party, since dead, who knew the fact and had no interest to falsify it. (*Doe vs. Robson*, 15 East 33. *Holliday vs. Littlepage*, 2 Munf. 316. 1 Starkie 71, note (b.) So an entry of the receipt of Ecclesiastical dues in the book of a deceased rector is evidence for his successor. (2 Ves. 43. 7 East 290. *Bunb.* 46-180.) And entries in the usual course of business. (*Lord Torrington's case*, 1 Salk. 286. 2 Lord Ray. 873.) The hand writing of course must be proved.

24th. What a witness swore on a former trial may be given in evidence between the same parties, if the witness be dead, or could not be procured. (*Fry vs. Wood*. 1 *Atk.* 445. *Peakes Ev.* 58. 2 *Esp. N. P.* 755. *Phillips Ev.* 199.)

25th. So the declarations of a deceased occupier of land, were received as evidence under whom he held, to prove seisen in a devisor. (*Halloway vs. Rakes*, 2 *T. R.* 53. *Uncle vs. Wilson*, 4 *Taunt.* 16. *Phillips Evi.* 182.) Upon the principle that without such evidence it might have been impossible to prove an occupation by the deceased under a particular person, he having the peculiar knowledge of the fact, and likewise being against his interest to acknowledge a landlord; as it might be produced as evidence against him in case of an action by the landlord. So a deceased tenants declarations, whether certain lands were parcel of A's or B's estate. (*Davis vs. Pierce*, 2 *T. R.* 53. *Bridgman vs. Jennings*, 1 *Lord Ray.* 734. *Vin. Ab. Ev. A.* (b.) 38. pl. 10.)

26th. Declarations of a living tenant are admitted in some cases. (*See Walkervs. Broadstock*, 1 *Esp. R.* 458.) So the declarations of an underlessee are *prima facie* evidence of underletting. (*Hindly vs. Richarby*, 5 *Esp. Rep.* 4. *See 2 Dall.* 93.) These declarations of tenants are only admissible as to *tenancy and possession*, but not as to title. (*See Phillips Evi.* 182. note (a.) *Waring vs. Warren*, 1 *John. Rep.* 340, and cases in the note. *Ante*, *Hall vs. James* 123.)

27th. The acknowledgements of a party to a deed or will, to the subscribing witness, of his signature, when not signed in the presence of the witness. (3 *Starkie* 1685. *Bilbeck vs. Granberry*, 2 *Hayw.* 232.)

28th. Declarations by a testator which are *cotemporary* with the act, are not only admissible, but most important evidence, to prove his intention and the legal quality of the act; (3 *Starkie* 1715,) as expressions made *before or after* making the will, might possibly be used by the testator, on purpose to disguise what he was doing, or to keep the family quiet, or for other secret motives or inducements. (2 *Vernon* 625. 2 *Roberts on Wills* 39.) Declarations made *after* making the will have more weight than those *before*; but with different degrees of weight all these declarations are admissible. (2 *Roberts* 40.) R.

ELISHA WILLIAMS vs. WILLIAM REARRS and SAMUEL M. CUMMINGS. *et. al.*

Where judgment is obtained against one of several defendants, the plaintiff can not be nonsuited.

In this case, which was a motion to set aside a nonsuit, several important points were brought up by Mr. Haynesworth the appellants counsel, but the court set aside the nonsuit on the ground, that where there are two defendants,

against one of whom there is a judgment by default, the other defendant cannot nonsuit the plaintiff.

Judge COLCOCK.—“The plaintiff having obtained judgment against one defendant cannot be nonsuited by the other. By being nonsuited, he is turned out of court with costs. His suit is at an end. It involves an absurdity to say, because one defendant has a good defence, that a plaintiff shall not be permitted to recover against another who acknowledges the debt.

It may be a good reason why a verdict should be found for him who has the defence, and he be dismissed with his costs. It seems, however, that the question has been raised on former occasions, and more than once determined.

In 1 *Sellon* 464 it is laid down, that where there is a judgment by default against one defendant in a joint action, the other cannot nonsuit the plaintiff at the trial, on issue joined by him. And this is supported by the authority of *Ld. Mansfield* in the case of *Weller vs. Gayton & Walker*, (1 *Burrow* 358,) in which he says “if he (*plaintiff*) is nonsuited he will be out of court as against both defendants, which cannot be, having a judgment against one.” And Mr. Justice *Denison* who concurred, referred to a case of *Greaves vs. Roll & Newell* in 2 *Salk.* 456; and in a note to the case reference is made to 12 *Modern* 651, and 1 *Ld Raymond* 716.

The question then appears to be well settled and the motion is granted.” (a)

(a) By the English Common Law, a plaintiff could not be nonsuited against his will. It was a proceeding of his own seeking. (*See Sylett vs. Love*, 2 *Wm. Black. Rep.* 1221. *McBeath vs. Haldimand*, 1 *D. and E.* 176. *Watkins vs. Towers*, 2 *D. and E.* 281.) But in this state, it is a right which the defendant can claim of the court against the plaintiff, if at the end of the plaintiff's testimony he has not made out his right to recover, either from defect in evidence or law. In the case of *Lovell vs. Parter*, brought up by the writer of this note, a motion was made to set aside a nonsuit, which the plaintiff had objected to, claiming a right to go to the jury; but the Appeal Court stopped the counsel, and said it had always been the law in this state that the plaintiff might be nonsuited against his will, though he appeared and objected to it, claiming the right to go to the jury. R.

S. WILSON vs. A. MULLEN.

Where the defendant indorsed a note, which was *not negotiable*, obliging himself to pay it, if the drawer proved insolvent, or "to make it good," all that can be required of the indorsee is that he should first use the ordinary means to get payment from the maker before he resorts to the indorser. The rules applicable to *negotiable* instruments do not apply.

York Spring Term, 1825.

The defendant assigned to the plaintiff a note given by one William Kerrs, and promised "to make the same good if it was not," or in other words to pay if the drawer proved insolvent. The note was not negotiable.

The plaintiff sued Carr to the first ensuing court and got judgment at the second court, but gave no notice to Mullen until after the judgment against Kerr, which was nearly, or about, a year after the note became due. The court decreed against Mullen, for the note, and the costs of suit against Kerr.

The defendant appealed.

1st. Because the plaintiff gave no notice of non-payment by Kerr, which he was bound to do.

2nd. Because he was not liable for the costs of the suit against Kerr; as he had no notice of the non-payment.

Williams, for the motion—Cited, 2 *N. Cord* 398. *Stockman vs. Riley*. Indorser must have notice of the non-payment of a note endorsed after due. (*Park vs. Duke, Ibid.* 380.) An endorser of a note under seal is not liable on his endorsement.

Norr, J.—As the note in this case was not a negotiable one, the assignor would have incurred no liability by an assignment in the usual form. He appears to have been aware of that, by the form which he has adopted. He has therefore undertaken to use his own language "to make it good;" which will admit of no other construction than that he intended to guarantee the solvency of the maker. All therefore that could be required of the indorsee was that he should first use the ordinary means to get payment from the

maker, before he should resort to the indorser. That he has certainly done. This is not analogous to the case of *Stockman vs. Riley*, 2 *McCord* 398. That was a negotiable note. But this case is not governed by the rules applicable to negotiable instruments. The court are of opinion that the plaintiff used all the diligence that the nature of his contract required, and that the motion must be refused.

Williams for the motion.

Rogers, contra.

**DAVID ANDERSON Ordinary, vs. WM. MADDOX, BASDEN GUIN-
and GEORGE THOMSON.**

An action can not be maintained at law, on a guardianship bond (nor on an administration bond) before the accounts have been adjusted and a specific sum decreed to be paid over.

Tried before his honor Judge Gantt, at Laurens fall term, 1824.

The plaintiff commenced an action of debt against the defendants on a guardianship bond, given to him as ordinary, by Wm. Maddox as guardian and the other two defendants as his sureties. The defendants pleaded specially that neither the one, as guardian, nor the other two, as sureties, had ever been called on to account, either in the court of ordinary or equity.

The plaintiff demurred generally to this plea,

The presiding judges sustained the demurrer.

The defendants moved the Constitutional Court to reverse this decision, on the ground.

That the action ought not to have been brought on the bond, before the accounts were adjusted in the proper court.

NOTT, J.—The only question in this case is, whether an action can be maintained, in a court of law, on a guardianship bond, before the accounts have been adjusted, and a

specific sum decreed to be paid over? It has been several times adjudged in this court, that an action cannot be maintained on an administration bond, until the administrator has been cited to appear before the ordinary to render an account of his administration.

It is true, the form of an administration bond is somewhat different from the bond now under consideration. But the substantial objection to the jurisdiction of a court of law is, that the administrator can neither be compelled, nor even permitted, to render in his accounts upon oath in that court; nor is the course of proceeding such as to enable the court to do justice between the parties. The objections apply with full force to a guardianship bond. A guardian may be summoned to appear before the ordinary when he has been appointed by that court. If he refuses to obey the summons, he may be compelled to account in the court of equity, or the ordinary may decree against him. If he appear before the ordinary and settle his accounts, and a sum certain be decreed to be paid, that sum may be recovered on the bond in a court of law. If the plaintiff set out the condition of the bond in his declaration and assign a specific breach, so that it shall appear to the court that no inquiry into the state of the defendants accounts will be necessary, I can see no objection to maintain the action in a court of law; but it can not entertain jurisdiction as long as the accounts remain unadjusted and the settlement of the accounts be involved in the issue. The motion must therefore be granted.

P. Farrow for the motion.

Downs and Young, contra.

W. P. RIVERS vs. WM. CAIN.

Where the defendant sold and warranted a horse to the plaintiff and a prior lien deprived the plaintiff of the benefit of his purchase; and the parties agreed to estimate the damages at \$30 less than the plaintiff had paid for the horse, the plaintiff may recover the \$70, either on a count for money had and received, or by a special count on the breach of warranty.

The plaintiff bought a horse from defendant, paid him the price, \$ 100, and took a receipt with a warranty. The sheriff afterwards levied upon the horse, as the property of the defendant and sold him. Upon this the plaintiff agreed to take \$ 70 for the horse, and defendant paid him \$ 26 in part. The declaration contained two counts. The first for breach of the warranty: the second a general *indebitatus assumpsit* for money had and received. A motion was made for a nonsuit, but the court supported the declaration on the second count, and rejected the motion. The defendant now moved for leave to enter up a nonsuit on the grounds:

1st. Because the plaintiff failed to prove any breach of warranty, as laid in his declaration:

2nd. Because the second count being general *indebitatus assumpsit* for money had and used, the plaintiff could not recover, in as much as he proved a special agreement for the payment of \$70, on a sale of the horse back to defendant.

NOTT, J.—The whole contest in this case appears to me, to be a mere dispute about words. The defendant's counsel appears to consider the action as brought on a contract for the sale of a horse, and therefore contends that the plaintiff ought to have declared on the special contract and not on the warranty of the first sale, nor for money had and received. But if he will only change the terms, and call it a rescission of a contract, for the sale of a horse, as it really was, then the defendant had received so much money for the use of the plaintiff. The action was therefore clearly maintainable on that ground. I do not see any reason why it should not be maintained on the warranty also. The promise of the defendant, to refund seventy dollars of the money that he had

received, might well be construed into an acknowledgement that he could not support the warranty which he had made. Liquidating the damages, which he should pay, did not destroy the warranty. Suppose A. should enter into a contract to deliver to B. ten bags of cotton, and should fail to perform it? An agreement to value the cotton at fifty dollars a bag would not do away the first contract. It would be nothing more than assessing the damages themselves, instead of leaving it to others to do. The case under consideration is in principle the one supposed. The defendant had sold and warranted a horse to the plaintiff. A prior lien deprived the plaintiff of the benefit of his purchase. The parties agreed to estimate the damages for that breach of warranty at thirty dollars less than the plaintiff had paid for the horse. Call it a re-sale, or whatever else you please, that is really the state of the case.

It is a case in which the court are not disposed to use any great ingenuity to defeat the plaintiff's action. The defendant had received from the plaintiff one hundred dollars for a horse which it appears he had no right to sell. The plaintiff, to avoid a law suit, agreed to receive back thirty dollars less than he had paid. He has been driven to an action to recover it, and the defendant would now deprive him of that also.

The motion must be refused.

Wm. Mayrant, for the motion.

Haynesworth, contra.

WOODWARD vs. HILL.

Executions bind property throughout the state, from the time they are entered in the sheriff's office.

But a party may lose his priority by delay; as the sheriff is not bound to notice any executions but those in his own office.

But if an execution be sent to the sheriff from another district, he is bound to enquire when it was lodged in such district, and to pay what money he may collect to the oldest; but without such notice he will not be liable for money paid to a junior execution.

Nothing more in this case is necessary to be published than the opinion of the court.

NOTT, J.—The plaintiffs obtained judgment against the defendant, at Fairfield November term 1823, and lodged their executions in the office of the sheriff of Fairfield the 17th of January 1824.

William Estes and John Crosby and William Davis obtained two judgments against defendant in Chester, Oct. 1823, and lodged their executions in the office of the sheriff of Chester the 8th of Nov. 1823, and in the office of the sheriff of Fairfield the 20th of February 1824. On the 10th of March, 1824, the sheriff of Fairfield levied on the defendants land in Fairfield by virtue of the three executions. And on the fifth of April sold the same for \$600.

The question is, which of these executions is entitled to the money?

Previous to the year 1789 all writs were issued from, and made returnable to, Charleston; all judgments were entered up and all executions issued from there. It must then have been understood, that judgments from the time they were entered up and executions from the time they were lodged in the sheriffs office, had a lien on the lands and goods and chattels of the defendant, throughout the state. In the year 1789, an act was passed giving to the circuit courts complete original and final jurisdiction, &c. (P. L. 487.) The eleventh clause of that act requires the clerks of the several circuit courts to send an account of all the judgments enter-

ed up in their courts to Charleston, twice a year, to be there put on record; and the fourteenth clause of the same act provides that no judgment not docketed and entered in the books of the clerk, at the seat of government, shall affect any property real or personal, as to purchasers or mortgagees, or have any preference against heirs, executors, or administrators, in their administration in their ancestors, testators or intestates estates, except the property real and personal within the particular district where such judgment next shall be entered up. This act extends to purchasers and mortgagees only, and not to creditors. It must however have been predicated of the idea, that lands were bound by judgments throughout the state. For if they were not so bound, the restriction was unnecessary; and judgments must still have the same binding efficacy as before, except so far as they were restrained by this act. The act does not embrace executions. They must therefore, remain as before. By the act of 1721, (*P. L.* 116) executions are made to run into all the counties in the state; and the object is declared to be "to prevent persons from escaping out of one county into another, or moving their goods, to avoid the payment of their just debts, after judgment had against them;" which seems to imply that the lien should attach, although the property may be removed. The same priority is preserved in the act of 1789, directing the order in which the debts of deceased persons shall be paid. There are also other acts authorizing executions to run throughout the state. From all of which I think we must conclude, that executions bind property throughout the state, from the time they are entered in the sheriff's office. The party however, may lose his priority by delay. A Sheriff is not bound to search every office throughout the state, to ascertain what executions may be in them. He is not bound to notice any except those in his own office. If however, one be sent from another district, he is then bound to ascertain when it was first entered in the office of the district from whence it issued. And must pay over the proceeds of

all sales, which may be made, or monies which may be in his hands at the time of such notice to each execution according to its legal priority. But he will not be liable for monies actually paid over to junior executions in his office without such notice. The sheriff therefore in this case must pay the money in his hands in the manner herein directed.

Gregg and Hunter for the motion.

Williams contra.

THOMAS R. MCCLINTOCK, Sheriff vs. JAMES GRAHAM.

When a sheriff levies on personal property, it becomes his own, for all legal purposes. He can maintain an action for it, even against the debtor himself, at any time before the sale, or satisfaction of the execution.

When the execution is satisfied, if otherwise than by sale of the property, the right of the debtor recurs, and the right of the sheriff ceases to exist against him.

The sheriff's right, still, however, until return of the property to defendant, remains against every other person, than the owner; for the owner looks to the sheriff for a return of the property when the execution is satisfied; and the sheriff may maintain trover against any, but the lawful owner, for a conversion.

The plaintiff by virtue of an execution at the suit of Ann Franklin, against John and Daniel Trussell for eighty odd dollars, caused a levy to be made on the following property to wit: 123 acres of land, a cotton gin, brushing machine, and running gear, a fann, and the Still, in question. Under this execution and the levy thus made, a sale had been effected of property to an amount exceeding one hundred dollars over and above what was necessary to pay the execution. The defendant took away the Still, and this action was brought by the sheriff to recover the value of it.

The jury were told by the court (his honor Judge Gantt,) that the plaintiff, from his own shewing had no cause of action. That the law did give to the sheriff a qualified right, which would enable him to maintain trover for the con-

version of property which had been levied on, but so soon as the object for which the levy was made had been effected there was no longer any lien on the remaining goods, nor any qualified right in the sheriff. That it did not appear from any evidence adduced, that the amount of sales under this execution had been applied to older executions, and in default of such proof, the testimony was conclusive, that the plaintiff had no cause of action.

The jury found for the defendant.

This appeal, was to set aside the verdict, for misdirection of the judge.

NORR, J.—When a sheriff levies on personal property it becomes his own for all legal purposes. He can maintain an action for it, even against the debtor himself, at any time before the sale or satisfaction of the debt. When the execution is satisfied, if otherwise than by sale of the property, the right of the deb or recurs, and the right of the sheriff ceases to exist against *him*. It still however remains against every other person. The owner looks to the sheriff for a return of the property when the execution is discharged. And for that purpose the qualified property which he had acquired by the levy still continues. The defendant in this case does not appear to have any title. He is therefore a mere trespasser, and the defence which he sets up will not sustain his claim. It was of no importance therefore whether the execution was satisfied or not, unless the action had been brought against the lawful owner.

The motion must be granted.

R. G. Mills for the motion.

Williams contra.

A. PERRY, Sheriff, vs. SYMON CLYMORE.

A parol release cannot prevail against a deed. So where A. gave the sheriff his bond to produce a slave named B. at a certain day, A. cannot prove by parol that the sheriff agreed to receive a negro named C. instead of B.

On the plea of *non est factum* to a bond conditioned to perform covenants, the plaintiff must have a verdict, if the bond be proved; and on a reference to the jury to assess the damages they cannot find for the defendant.

Where the court obliged a plaintiff on motion of the defendant, while the case was before the jury on the issue of *non est factum* in a suit on a bond for covenants, to submit the question of damages to the jury, without being served with a rule by the defendant, so to do, the court said, they would not set aside a verdict found under such circumstances, unless the plaintiff had objected, before the verdict, on account of the surprise, or on account of his want of preparation to prove his case before the jury.

Tried at Lancaster Spring Term, 1825.

This was an action of debt on a bond conditioned for the delivery of a negro named Daniel, levied on, under an execution at the suit of Wilson Allen, against Fowler Williams: Plea, *non est factum*.

The defendant claimed the right of submitting the condition of the bond to the jury, under the act of assembly, that the damage sustained by the plaintiff might thereby be ascertained; and the presiding judge ruled accordingly, though it was objected to by the plaintiff's counsel.

It appeared in evidence, that Daniel was valued at \$500, that he had been levied on under the above execution, and that he was not produced according to the condition of the bond; but that plaintiff told the defendant that if he could get the two Georges they would answer the same purposes as Daniel. The two Georges were put into the plaintiff's possession and were sold by him. Walker bought one, and the witness, Temple, saw plaintiff receive some of the money, The witness said further, that the execution of Willson Allen, vs. Fowler Williams was placed in his hands by the plaintiff, for the purpose of taking the two Georges; but that he failed to get them, and returned the execution. John Bevins proved that he was present when the plaintiff had possession of

the two Georges, and heard the plaintiff address the defendant thus, 'old gentleman make yourself perfectly easy about the affair, for I have got what will keep you safe.' The two Georges were present at the time.

On this evidence the jury found for the defendants.

The plaintiff moved for a new trial on the grounds, that

1st. This being an action of debt on a penal bond for the performance of covenants, and *non est factum* pleaded, the plaintiff was entitled to a verdict on that plea.

2nd. Because the court charged the jury, that the condition of the bond was before them, though the plaintiff objected, until compelled thereto by rule for that purpose, which had not been previously taken out; and that the plaintiff could not recover, as he had not proved any damage, which he was bound to do.

3rd. Because the court ruled, that a parol release could discharge a party from performance of an agreement under seal.

NORR, J. I think the plaintiff was entitled to a verdict in this case on the plea of *non est factum*. The condition of the bond was not submitted to the jury for the purpose of determining whether the plaintiff was entitled to a verdict; for that had been already decided on the general issue. But the sole question was the amount of damages he had sustained. If however, upon that enquiry, it had appeared that he had sustained no actual injury, the court would not perhaps have granted a new trial, merely for the purpose of saving the plaintiff the costs.

The second question is more a matter of form than substance. In the case of *Mitchell vs. Dawkins*, (*Harper* 479;) the court decided that the defendant should have ruled the plaintiff to submit the condition of the bond to the jury; but in that case no notice was given of such an intended motion, until after court had adjourned. In this case the motion was made while the case was before the jury on the other plea. A rule in such case would be a mere formal ceremony. If the plaintiff had

objected upon the ground of surprise or of not being prepared to go into the case, I think it would have been a good objection. But he does not put it on that ground. This motion therefore ought not to prevail.

I am of opinion however that he is entitled to a new trial on the third ground. A parol release cannot prevail against a deed. But in this case there was no proof even of a parol release. There was a promise to release if the two other negroes were delivered. But there was no proof that the condition on which the promise was made was ever performed. It was proved that he had the two Georges in his possession. But there was no proof that they were delivered to him by the defendant. The plea of release was not sustained, and a new trial must therefore be granted.

Williamson and Clinton, for the motion.

Miller and Dunlap, contra.

**Assignees of LOWRIE vs. WILLIAMSON and al. Same vs. HINDS,
Same vs. EMANUEL.**

An insolvent debtor, who assigns under the insolvent debtors act, is considered as having assigned over only so much of his choses in action, as shall appear upon settlement to have been actually due at the time of the assignment. The balance is vested in his assignees, but no more.

In a suit by the assignees of an insolvent debtor, a person who owed an insolvent debtor at the time of the assignment made, will not be permitted to set-off a debt afterwards acquired, but may set-off any that he had before the assignment, though the suit be brought within a year.

The cases must be governed by the state of things at the assignment.

Tried at Sumter, before Judge James. The opinion of the court contains every thing necessary to be published.

NORR, J.—There were three cases depending on the same principle. The plaintiffs were assignees of Lowrie, an insolvent debtor. The defendants offered, in discount, demands which they had against the assignor, previous to the assignment having been made. But the presiding judge was

of opinion that they had lost the benefit of their discount by the assignment. The act for the relief of insolvent debtors, declares that the property assigned by an insolvent debtor shall be for the benefit of such of his creditors as shall be willing to receive a dividend thereof. It also exempts the debtor from any suit, either by those who do or do not accept a dividend, for twelve months after the assignment made. It is now contended that at common law mutual demands could not have been set-off. That a set-off, therefore, is to be considered in the nature of a cross action; and that a person having a cross demand must be considered in the light of a creditor and must therefore accept a dividend with the rest of the creditors, or must wait until the expiration of a year, before he can bring his action, or, what is considered as the same thing, before he can avail himself of his set-off. It is true, that by the common law mutual debts could not be set-off, but each party was driven to his action. But that was a weak part of the common law. It has long ago been altered and is now no longer considered as law in any country where the common law ever prevailed. And since the law of set-off, that party has always been considered as the creditor to whom a balance appeared to be due, after an adjustment and settlement of all accounts, reckonings, and demands whatever betwixt them. An insolvent debtor therefore, is considered as having assigned over only so much of his choses in action, as shall appear upon settlement. That balance is vested in his assignees, and no more. The principle by which these cases must be governed will be found laid down in the case of *Shepherd and Turner*, (b.) decided during the setting of this court. A person who owes an insolvent debtor, at the time of the assignment made will not be permitted to set off a debt afterwards acquired. That would be a fraud upon the other creditors. The cases must be governed by the state of things at the time of the assignment. It would appear by the report of the first of the above cases somewhat doubtful whether the

(b.) See next case, *post*.

demand attempted to be set-off was actually due to the defendant at the time his debt was assigned. But the opinion of the court on the general question precluded an enquiry into that fact. So that the motion for a new trial must prevail in all the cases. (a)

Ervin, for the motion.

S. D. Miller, contra.

SHEPHERD vs. TURNER.

Debts to be set-off must be mutually *subsisting* debts at the time the action is brought; and where the defendant had made a *conditional* bargain for a note against the plaintiff of a third person, but the agreement was never executed till the suit was brought, it is not such a subsisting debt as can be set off.

So, the same doctrine prevails in cases of bankruptcies. The set-off must have been an existing debt between the parties, at the time the bankruptcy happens.

So the same rule applies with regard to administrators. The set-off must have been mutually subsisting at the death of the intestate.

The cases of *Reynolds vs. Baring*, and *Sullivan vs. Montague*, (*Doug.* 106-112.) said to be over-ruled.

The Judge's opinion contains every thing that is deemed necessary to be published in this case.

NORR, J.—It appeared by the report of the presiding judge that the note, allowed to be set-off, in this case had not been actually transferred to the defendant at the time the action was commenced. Something like a contract appears to have taken place between the payee of the note and the defendant. And, to use the language of the judge, "the defendant had the election of taking the note as of that date." If he had the election to take, he had the right to refuse. And that right must have been reciprocal. It was, therefore, at most, a mere naked contract, which could not have been enforced on either side. But, even if the contract had been completed for a

(a) See *Happoldt vs. Jones*, *Harpers Law Rep.* 109. *Hindle vs. Davis*, 33.

valuable consideration, as long as it remained executory and the right to the note not changed by actual delivery, it was not a subject of set-off. Debts to be set-off must be mutual subsisting debts at the time the action is commenced. Some of the early cases, to be sure, seem to favor a different opinion. (*Reynolds vs. Baring*, *Douglass* 112, in note. *Sullivan vs. Montague*, *Do.* 106.) But they have been overruled by later decisions. (*Evans vs. Prosser*, 3 *D. and E.* 186.) Judge *Buller* said he had looked into the case of *Reynolds* and *Baring* and found that it could not be supported (*Montague on Set-off* 35. *Carpenter vs. Butterfield*, 3 *Johnsons Cases* 145.) The same doctrine prevails in cases of bankruptcy. (*Dickson vs. Evans*, 6 *D. and E.* 57.) To entitle a person to a set-off, his demand must be an existing one at the time the bankruptcy happens. Lord *Kenyon* observed in that case, that "it would be most unjust indeed if one person, who happens to be indebted to another at the time of the bankruptcy of the latter, were permitted, by any intrigue between himself and a third person, so to change his situation as to diminish or totally destroy the debt due to the bankrupt by an act, *ex post facto*." And Judge *Ashhurst* observed in the same case; that much fraud and great injustice would be introduced if any other rule were to prevail. We have adopted the same rule with regard to administrators. Debts mutually subsisting at the death of the intestate, only, are allowed to be set-off. (*Ezekiel May the Adm'r. of Thomas White vs. Sarah Flak*, 2 *Nott and Mc Cord* 398.) The same principle applies to all the cases. The plaintiff may have wanted his money to pay the very debt which has now been set off against him. The defendant refused to pay, until he drove the plaintiff to his action, and then he has obtained the possession of this note for the purpose of throwing the costs upon him. Such a speculation cannot meet with the support of this court. I agree with the presiding judge that the indorsement was immaterial, because being payable to bearer the note would have passed by delivery. But, in either case, the defendants

right could only have accrued from the time of delivery.
The motion therefore must be granted. (a)

James J. Caldwell for the motion.

Baussett and Dunlap contra.

STINSON *ads.* PIPER, HOGAN *vs.* BOWLWARE.

A warranty of the *soundness* of a slave, includes soundness of the *mind*, as well as of the *body*.

The whole point in this case is developed by the opinion of the court, and needs no previous statement.

NOTT, J.—These cases both depend upon the same principle. In the first, the plaintiff brought his action on a warranty of soundness of a negro woman. In the second, the breach of warranty was set up by way of defence. In one, the jury found for the plaintiff, in the other, for the defendant. But, in both, they found the property to be unsound. The evidence was such as to render them both fit cases for the consideration of a jury, and therefore, as it regards the facts, the court would not feel disposed to interfere. But the unsoundness, complained of, was a want of understanding. And a question has been made whether a warranty of soundness embraces soundness of mind as well as body. No question of implied warranty arises in either case. There is an express warranty in both. So that the whole question depends upon the construction of the word “sound,” in the warranty of a slave. As a general term it is sufficiently comprehensive to embrace both soundness of mind as well as of body. And when we look to the object of a warranty, it is difficult to conceive why it should not apply as well to one as to the other. A warranty of soundness would seem to imply a capacity to perform the ordinary duties of a slave.

(a) The case of *Buller, Assignee, vs. Dunlap*, & in this term was decided on the authority of the above case of *Turner and Shepherd*. R.

Whether the want of capacity arises from want of bodily strength or understanding, the effect is precisely the same. And there is the same failure of consideration in both cases. The argument is, that the warranty extends only to unsoundness arising from physical causes. Admitting the correctness of that position, it would advance us but a little way towards the solution of the question. For whether unsoundness of mind proceeds from moral or physical causes, or may proceed from both, is a question respecting which, perhaps doctors will disagree. We do know, from actual observation, that a defect of understanding may result from physical causes. A fracture of the skull, or a pressure upon the brain, will destroy the understanding for a time, and some times permanently. Mr. Addock speaks of lunacy as a disease. (2 Add. Chan. 727.) Lord Hardwicke says: "Lunatic is a technical word, coined in more ignorant times, as imagining that those persons were affected by the moon; but it is discovered by philosophy and ingenious men, that it is entirely owing to a defect of the organs of the body." (3 Atkins 174.) And the learned authors of the *New Medical Jurisprudence*, observe that "congenital idiocy, or idiocy *de nativitate*, arises from a malformation of the cerebral organ." (1 Paris and Fonblanque 308.) It is a subject, however, on which different opinions are entertained. A respectable writer observes, "some writers contend that insanity is wholly a disease of the mind and not of the body, whereas others suppose that *mania* in general, depends on physical origin, or arises from disorganization or morbid action of some part of the body; derangement of the intellectual faculties being only the effect. Which supposition is somewhat supported by the appearances frequently to be observed in the head, upon dissection." (Thomas' Practice 480.)

Here, again, we have the highest evidence of the existence of a physical cause, ascertained by actual dissection. Dr. Zimmerman, indeed, who says he visited all the hospitals in France, thought that the maniacs might be distributed

into three classes,—the men who became so through pride, the girls through love, and the women through jealousy. (*Paris & Fonblanque*, 326.) Now, admitting this conjecture to be correct, it does not prove that these diseases did not result from a defect of physical organization. The affection of the mind might operate as an exciting cause, as it may of fever or any other disease. And still it may affect only those where there is only an organic defect. For men may be proud, girls in love, and wives jealous, and not be perfect maniacs. But these observations can only tend to shew what indeed it was my wish to shew, how unprofitable such an enquiry must be. If it be a question which has baffled the research, and divided the opinions, of the most profound physiologists, how inadequate must we be to decide it. If however, we can not ascertain the cause we know the effect. It is to deprive the purchaser of the benefit of his purchase; which it was the intention of the warranty to secure to him. The same author, above quoted, further remarks, that every species of madness, whether originating in the mind or body, becomes the same by continuance. Both the mind and body must ultimately be diseased. For a disease of the mind soon produces one of the body. Perhaps there are but few cases where the mind is affected that the body does not participate.

The only practical construction, therefore, that we can give to such a meaning is, that it shall embrace both. And in coming to that conclusion I am satisfied I have adopted the commonly received opinions on the subject. I have been a little surprised that, looking into the cases which have occurred in the other states, where this species of property is owned, I cannot find a single case where the question has been made. And I presume the cause must be, that no doubt has been entertained upon the subject. All the reasons of policy and common honesty would lead us to adopt that opinion. Disease of the body may be latent and not known to the seller. It is not so with those of the mind. Insanity or idiocy can not escape the knowledge of the owner; but may, during the

treaty of sale, elude the vigilance of a purchaser. In those cases, therefore, there must usually be actual fraud coupled with a breach of warranty, which furnishes an additional reason why we should construe the warranty to extend to a soundness of mind as well as of body.

It is a question on which we cannot expect light from the English books, because slavery is not allowed in that country. Soundness of property in their law cannot extend to mind, because they are not in the habit of dealing in property possessed of intellect. But, I think that the view which I have taken is fully supported by the Civil Law. We have sometimes adopted the Civil Law in opposition to the principles of the common law; and we may, surely, resort to it in a case to which the common law does not extend; particularly to ascertain the application of a word derived from the Roman language. The word *Sanitas* is rendered, health, soundness of body, mind, wit and memory; *Sanus*, whole, healthful, sound in health sound of memory, in his right mind. (*Young's Dictionary*. (a.) *Woodeson*,* speaking of the Roman Jurists, by whose laws he says human beings are frequently regarded as objects of sale, introduces this question: (*Dig. de cont. empt. L. 43. § 1. Si quis hominem luminibus effossis emat et de sanitate stipuletur, de cetera parte corporis potius stipulatus videtur, quam de eo, in quo se ipse decipiebat.* See also 1 *Domat*, 85. likewise *Horace, B. 1, Sat. 3.* where it is laid down that if a person sell a slave, warranting him to be sound generally, using the word *sanus* the seller must specially except soundness of mind, if he intends to avoid a law suit.

*Sanus utriusque,
Auribus atque oculis: mentem nisi litigiosus,
Exciperet dominus, cum venderet.*

Our word *Sanity*, which we generally use to express a soundness of mind, is nothing more nor less than "*sanitas*," with an English termination, which is here used with refer-

(a) Soundness implies *mens sana in corpore sano*.

R.

* 2 Vol. 416.

ence to a bodily infirmity, and which has acquired that limited sense, in our language, from use alone. The plain English word *sound*, unless restricted by the adjunct *body* or *mind* is considered as embracing both. And the long use of it in that sense, in instruments of this nature, ought now to sanction that construction of it. For, *usus jus est, et norma loquendi*. I think, therefore, that in any view of the subject, the warranty in both cases, has been broken, and that the verdicts ought to be supported.

The motions therefore, in both cases, are refused. (b)

J. Starks and Clarke, for the motion.

Pearson and De Saussure, contra.

(b) In concurrence with the opinion of the court, are the following authorities from the Civil Law writers, and from some of the classics.

"Qui vendunt mancipia, solent hoc adicere, sanus corpore et animo. Juris erat apud Veteres, ut cum servum distraheret quis, ejus omnia vitia, vel animi, vel corporis publicaret. (Vet. Schol. Hor. Ed. Gesneri. Lips. 1762.)"

See also Dig. Lib. 21. Tit. 1. §. 1. *de Edilitio Edicto*, where it is laid down: *"Qui mancipia vendunt, certiores faciant emptores, quid morbi, vitiiue cuique sit, quis fugitivus, errove sit, noxave solutus non sit, eademque omnia, cum ea mancipia veniunt, salam recte pronuncianto."*

"Causa hujus edicti proponendi est, ut occurratur fallaciis vendentium, et emptoribus succurratur, quicumque decepti a Venditoribus fuerint: dummodo sciamus venditorem, etiam si ignoravit ea, quæ Ediles præceteri jubent, tamen teneri debere: nec est hoc iniquum, potuit enim ea nota habere venditor: neque enim interest emptoris, cur fallatur, ignorantia Venditoris an calliditate."

§ 8 *"Proinde si quid tale fuerit vitii sive morbi, quod usum ministeriumque hominis impediatur, id dabit redhibitioni locum."*

That *Morbum* includes diseases of the mind as well as those of the body, will appear from the words of Sabinus: *"Furiosus, mutusve cuive quod membrum lacerum, laesumque, est aut obest quo minus ipse aptus sit, morbo est sunt. (Aulus Gellius Lib. 4. Cap. 2.)"* See also the Commentaries of Voet and Noodt, to Lib. 21. Tit. 1, of the Digest.

In the following case we think the purchaser was hard to please.

Ad Gargilianum, falsum venditorem.

Morio dictus erat, viginti millibus emi.

Redde mihi nummos Gargiliane: sapit.

(Mart. Epig. XIII. Lib. VIII.) R.

ADAM FULMER, vs. DENNIS HAYS, the same, vs. SHUMBERG.

Where usury is set up as a defence to an action, and the plaintiff is called upon by the defendant to swear whether the consideration of the contract was usurious or not, and does swear that it was not usurious, the defendant can not introduce other witnesses to *contradict* the plaintiff.

But the plaintiff may be called upon to prove one fact, and other witnesses to prove other facts, connected with it, all of which, taken together, may establish the usury, which could not be made to appear by any one witness.

Usury may, sometimes, be inferred from a train of circumstances.

These cases were tried at Lexington, spring term, 1825, before Judge Richardson. They were actions on notes. The defence set up was usury. The defendant gave the plaintiff notice that he would give evidence, as he was allowed, by the act of 1777, (*Pub. Laws*, 286. 2 *Brev. Dig.* 319,) of the fact of usury, unless the plaintiff would, in pursuance of the act, deny, upon oath, the truth of the usury. The plaintiff did come into court, and on oath denied that there was any usury in the case; and the only question which arose was, whether the plaintiff, having denied the fact of usury the defendant could now introduce other witnesses to prove the usury? The judge held that the defendant could not introduce other witnesses, but that he was precluded by the oath of the plaintiff.

The defendant now appealed.

NOTT, J.—The court concur in opinion, in this case, with the presiding judge. The defendant is not driven to his own oath, except where the fact cannot be proved by any other witness; and the plaintiff can never be sworn, except when he is called upon by the defendant. If the defendant can establish his defence by the other witnesses, he need not call upon the plaintiff. If he chose to call upon the plaintiff in the first instance, he ought not to be permitted to call other witnesses afterwards, to prove the fact. If his object in calling upon other witnesses be to discredit the plaintiff, it is unnecessary; for destroying the credit of the plaintiff does not establish the usury. I do not mean to say other witnesses

shall never be called after the plaintiff has been sworn; but that they shall not be sworn to *contradict* his oath. Usury may sometimes be inferred from a train of circumstances. The plaintiff may be called upon to prove one fact and other witnesses may be called upon to prove other facts connected with it, all of which taken together may establish the usury which could not have been made to appear by any one witness.

The motion must be refused.

James J. Caldwell, for the motion.

Caldwell and Jones, contra.

TILMAN HANKS *ads.* ROBERT DEAL.

An infant is not bound by a submission to an award, and a note given by him, in pursuance of an award, is void, though the matter submitted was a *tort* committed by the infant.

An infant is liable for torts, but it does not follow that his contracts in compensation for torts are valid.

This was an appeal from the judgment of a magistrate. The appellant, an infant, committed a tort, for which he was sued; the matter was submitted to arbitration, and the arbitrators awarded against him. The magistrate thought, that as the note was given for damages for a tort, for which he was liable, the obligation of the note was valid. Judge Gaillard dismissed the appeal, and confirmed the decision of the magistrate.

A motion was now made to reverse the decision. Because the award was voidable at least, and consequently the note was so.

Harrison, for the motion,—Said an infant could not submit a matter to an arbitrament. (1 *Jacob L. D.* 190. *Com. Dig. New Ed.* 659. *Bingham's Law of Infancy*, 93. *Kyd on Awards* 35.

JOHNSON, J.—Generally all contracts made by infants are either void or voidable. The exceptions to this rule

consists of contracts for his benefit: and even amongst these, the only one, perhaps, by which he is absolutely bound, is for necessities. (3 *Bacon, Inf. and Age, Letters F and I.*)

It is true, as is contended for in support of the motion, that an infant is liable for torts; and it is concluded that therefore he is liable on his contract to make compensation for the injury, as beneficial to himself.—If we give to this argument the greatest latitude, the conclusion must fail for the want of proof; for it would be difficult, if not impossible, in most cases, to ascertain the precise quantum of injury. The reasons of the rule, which exempts infants from their liability on contracts, is founded on their supposed want of capacity and discretion, and the law is so careful of the rights of infants that they are protected from contracts to pay extravagant prices even for necessities, (3 *Bacon, Tit. Inf. Age, I. 593.*) And if the agreement be tested by this reason it must at once fall to the ground; for surely it must require at least as much capacity and discretion to contract about a tort, as about the ordinary concerns of life. The fact that the consideration of the note in question was a compensation for a tort, is an assumption not warranted by the evidence. It is true that the award was on a matter of that sort, but an infant is not bound by a submission to an award; it could not therefore constitute evidence of the fact. *Kyd on Awards 35.* Motion granted.

Harrison and Shanklin, for the motion.

—, contra.

BLYTHE vs. SUTHERLAND. SAME vs. KEITH.

The declarations of a surveyor, dead at the time of the trial, who originally located the land, are admissible, on a question as to the location. (a) So, where the death of the surveyor was a matter of public notoriety, and the party inadvertently neglected to prove his death, and by direction of the court a verdict was found against him for that reason, the court granted

(a) See, *ante*, the case of *Spear vs. Coate* 237—and note 237. R.

a new trial, that he might prove that fact; as it was an inadvertence, from which the most circumspect are not exempt.

Applications for new trials, are, with some limitations, always addressed to the discretion of the court, which has often granted them, when verdicts have been obtained by surprise or inadvertence.

The great object of courts is to ascertain the truth of the facts between parties litigant, and where it is apparent that truth has not been attained, and that without a fault in the party amounting to negligence, the court will give relief.

Tried before Judge Gaillard, at Pendleton, Spring Term, 1825.

These were actions of trespass to try titles, and the only question was of location. The defendants offered the testimony of Stephen Adams, taken in writing by consent of parties, who stated as follows:

"I was well acquainted with the lines of Watt's tract a short time after they were run, and derived my information from Burnett Crafton, the original surveyor, who ran them. He shewed them to me four or five weeks after he made the survey. He shewed me a Poplar station on the north side of the Osloнды river on Rileys line, which he said was a station for both tracts, viz, Watt's and Riley's. He then shewed me a stake which he said was the north western corner of Watt's tract, and about two feet from it, a hickory bush or small tree, now a stump, which he said was the corner of Riley's land. I have lived within a mile of this land ever since, and am well acquainted with it. The said Crafton further told me that the line, commencing at the fallen red oak, and running west, was made by him, and intended, at first, as a boundary, but when he came to the good flat land, Watt's directed him to anull, and discontinue it, which he did. He then went to Riley's corner and placed a stake as a corner for Watt's tract, near the Hickory stump, aforesaid, and then ran a line so as to intersect the widow Criswell's line below. I went with the surveyor Maj. Lewis, and pointed out to him, as near as I could, where the stake corner stood near the stump aforesaid, and went with him on the N. E. line. I also

shewed him the fallen red oak where the annulled line commenced, I have examined the plat made by Lewis and think it a correct representation of the lines I shewed him. I told the grantor, under whom the plaintiff claimed, the night after he made the survey, that he had run into Watts' line."

His honor rejected this testimony on the ground that it was not proved that the surveyor, Bennet Crafton, was dead.

Verdict for the plaintiffs.

The defendants counsel moved the appeal court for a new trial, on the ground that the testimony should have been admitted; and urged for a new trial, that it was a matter of such public notoriety, that the surveyor, Crafton, was dead, that it was altogether inadvertency, occasioned by the notoriety of the fact, which caused the counsel to neglect the proof.

JOHNSON, J.—There has been no controversy about the question whether the declarations of a deceased surveyor, who originally located the land, is or is not admissible on a question of location. All agree that they may. Nor is it questioned that to let it in, it was incumbent on the party offering it in the first place to prove his death. If the case rested solely on this state of facts, the court would not hesitate to let the verdict stand. But it is obvious from the circumstances which have been developed, on the argument here, that the death of Crafton, the surveyor, whose declarations were offered, was a matter of public notoriety many years ago, and that the omission to prove it was an inadvertence from which the most circumspect are not exempt, or a confidence that formal proof of a fact so notorious would not be required, and furnish, in the opinion of the court, sufficient reasons for sending the case back.

Applications for new trials are, with some limitations, always addressed to the discretion of the court; and although it should be exercised with great caution and circumspection, yet our own decisions furnish many instances in which new trials have been granted, when a verdict has been obtained by sur-

prize or inadvertence. And the cases of verdicts manifestly against evidence furnish a wide field for the exercise of this power.

One of the most prominent objects in the institution and organisation of courts of justice, was to ascertain the truth of facts between parties litigant; and where it is apparent, that this object has not been attained, and that without a fault in the party, amounting to negligence, it becomes the duty of this court to give relief.

Motion granted.

W. R. Davis, for the motion.

Earle, Solicitor, contra.

TURPIN vs. BRANNON.

The declarations of a party, when accompanied by an act, may be received in evidence as explanatory of that act, as constituting a part of the *res gestæ*. So, where the plaintiff gave in evidence the acknowledgements of B. an incompetent witness, that he held as tenant for the plaintiff, the defendant may prove B's declarations as to his motives and the manner of his tenancy, as explanatory of the act.

Where a tract of land was sold at sheriff sale as the property of C. in an action to try titles between A. against B. the purchaser, a plat of resurvey made for C. may be given in evidence to shew the extent of the defendant's possession.

There are some exceptions to the rule, that a judgment cannot be given in evidence to affect any but parties or privies; as where it constitutes a link in a chain of titles, or goes to establish a collateral fact; as to shew that the declarations of a tenant could have no effect upon the rights of the parties from the situation in which he stood.

No color of title is necessary to give a party a right by possession. (a.)

After the quiet enjoyment of lands for five years (now ten) the law presumes a title in the occupant which may have been lost by accident. The possession is substituted in the place of title.

The possession being proved by other evidence, the deed is only looked to as defining its extent, and for that purpose a mere survey is as high evidence.

If a person be in possession of a particular lot or tract of land, well known by a particular name, the bounds of which are distinctly marked, it would

(a) See *Williams vs. McCre*, 1 Cong. Rep. 40.

be sufficient to authorize the jury from possession of a part to find a verdict for the whole, even though the possessor should have neither deed nor plat.

Whenever, therefore, a person holds by possession only, a deed, plat or any other color or semblance of title, will, usually, furnish of itself, sufficient evidence of the extent of his possession, without any other proof.

When he has not such evidence, he may resort to any other; such as visible marked lines, adjacent ditches, fences, or any other that shall be satisfactory to the minds of the jury.

State demands or claims of land are not to be encouraged.

Trespass to try title.

Spartanburg, Spring Term, 1824, tried before Judge Gaillard.

The plaintiff's title to the land in dispute, under a grant dated the 5th of March, 1787, was admitted. The defendant claimed the land as purchaser at a sheriff's sale, made on the 6th of January, 1823, and title from the sheriff dated on the 11th of the same month. He also set up another claim under a deed from the sheriff, dated on the 5th of February, 1822. The sale made on the 6th January 1823 was under a judgment of nonsuit against the plaintiff, by the defendant, entered up on the 5th of December, 1822. The judgment and execution were both ordered by the court to be set aside in April term, 1823.

The other claim set up by the defendant was under a deed from the sheriff, dated on the 9th of February, 1822, when the land was sold as the property of Hunt, at the suit of Turner. It had previously been sold as Spear's, at the suit of L. B. Pool, by the sheriff, on the 6th of September, 1819, and bought by Hunt to whom the sheriff executed a title on the 9th of October, 1819. The land was admeasured and laid out to Spears, pursuant to a warrant from James Smith, commissioner of location, by S. Dickson, a deputy surveyor, and a plat of it made by him on the 3rd of April, 1804; and another plat on the 19th of September, 1808. Spears was in possession of the land twenty odd years, and claimed it as his own, and continued in possession of it until ousted by Hunt. After the sale by the sheriff to Hunt, and not before, he spoke

of his being the tenant of Turpin, and on the 21st of October, 1820, acknowledged himself his tenant in writing. It was contended that the possession of Spears was of a fiduciary character, and that he could acquire no title to the land under the statute of limitations.

His honor instructed the jury that the title of the defendant, under the judgment and execution of Turpin could not be sustained; that the character of Spear's possession was a matter for their consideration. Besides the evidence that he claimed the land for himself, Dr. Young swore he heard him say he was going to see Turpin, that they had sold his (Spears') land for little or nothing, that he had offered to purchase it from Hunt, but that he would not give him a fair chance. He asked Dr. Young if he went and acknowledged himself Turpin's tenant whether he could not retain possession of it, and said they were suing him for the possession. His honor added, that whatever might be the effect of the acknowledgement to Turpin if the suit were between Turpin and Spears, it could not affect the right of the defendant, derived from Hunt, who purchased the land at sheriff's sale in 1819.

The jury found a verdict for the defendant.

The plaintiff appealed on the following grounds, viz:

1st. Because the deed to defendant made by the sheriff at the time the land was sold as the property of the plaintiff, ought not to have gone to the jury; even under the charge of the court that it ought not to avail defendant any thing.

2nd. Because the declarations of Spear, under whom defendant claimed to support his title, ought not to have been given in evidence.

3d. Because the plat of re-survey made in 1804, for Spear, was not legal evidence, or color of title to show the extent of his claim, and therefore ought not to have gone to the jury.

4th. Because the evidence on the part of plaintiff shewed that Spear entered as a tenant, or under a contract of

purchase from the plaintiff, and therefore the stat. of lim. could not barr the plaintiff.

5th. Because the character of the possession was at most *very doubtful*, and on that account, could not avail the defendant.

6th. Because the record in the case of William Hunt vs. John Spear, was given in evidence in this case.

7th. Because the court mistook the law in stating to the jury, that although the tenant could not acquire a title by possession against his landlord, for his own benefit, but still as respected the rights of third persons the tenant might acquire a title by possession even against his landlord.

8th. Because the verdict ought not to have given defendant more land than had been held in actual adverse possession by Spear for more than five years, the extent of which was not shewn.

Wallis Thomson.—The sheriff's title under a judgment and execution, which had been set aside, is not admissible. The judge charged afterwards, that the jury should not regard it. It is contended that the judgment was irregular, and yet the sale under it was good: admitted that the purchaser was not bound to look to the regularity of the proceedings. But he did not controvert that doctrine where a stranger is the purchaser. But it was different with respect to the plaintiff, who has carried on the irregular proceedings. A party may obtain a confession of judgment upon a forged or fictitious instrument. Here the deed was regarded as a nullity; yet it was allowed to go to the jury. What difference to the losing party if the judge admits improper testimony, and then tells the jury not to regard it. Who knows but the jury found on that deed. (15 Johns. 239.)

2nd. Because the declarations of John Spear should not have been admitted. He had no objection to the evidence of his living on the land, but to his claims of it. The evidence that Spears paid tax for some land was incompetent. party's declarations are not evidence for himself, or those

who claim under him. Spear was in court, and if a competent witness he should have been sworn (6 *Johns.* 21; 7 *Johns.* 96; 11 *Johns.* 185; 1 *Johns.* 339) The surveyor ought to have been produced to prove the survey. The objection that the record in the suit of *Hunt vs. Spear* should not have been admitted was valid. It was not proper evidence. In relation to the question whether Spear had acquired a title by stat. of limitations the evidence was unnecessary, if *Hunt* had acquired Spear's title. The record was not evidence except between parties and privies. (1 *Wheat.* 6.)

As to the statute of limitations, there was no evidence to shew marked lines, but the plat. The question was whether possession of a small part could establish a right to that extent. As to Spear's letter, he said the judge instructed the jury that the letter was of no weight, without that to which it was an answer. The letter was before his title vested. It would shew that he was not holding adversely. It put Turpin off his guard. Spear said, when the land was sold as his property that it belonged to Turpin. (*Williams & Mc Gee, Cons. Rep.* 90.) Colour of title, he conceived, was any written muniment evidencing title.

Henry, contra.—A purchaser at sheriff's sale is protected though the judgment be set aside. (1 *Nott & Mc Cord* 12. *Id.* 408. 13 *Johns Rep.* 97. 8 *Johns.* 361.)

Earle, against the motion.—The deed was properly admitted. If a judgment be set aside, for matter dehors the record, a title which has accrued under it cannot be affected. (1 *Phillips Ev.* 131.) The declarations of tenants are always admissible, so far as they relate to possession. (1 *John Rep.* 159.)

Nott, J.—The degree of confidence with which the defendants counsel has pressed his claim for a new trial, in this case, has excited something more than ordinary attention in the court to discover if possible whether the motion really possesses the merit which has been supposed. But it has not appeared to us in the same point of view in which it has pre-

sented itself to the counsel. It appears by the first ground, that the judge permitted a deed to be given in evidence which was bottomed on a judgment that had been set aside. But it will be observed that when the deed was produced it could not be discovered that the judgment did not still remain in full force. And when it afterwards appeared to have been reversed, the judge instructed the jury that they must not regard it as constituting any part of the evidence. It will often happen that testimony may be admitted in an early part of a case, which may become improper by the after introduction of other testimony; or a judge may admit testimony of the incompetency of which he may afterwards become satisfied. In such cases, the only method of preventing the mischief which might otherwise ensue, is, by instructing the jury not to regard it. And it is always to be presumed, that they will be governed by such instructions. It would be very embarrassing if every such step were to be a ground for a new trial. I think, therefore, that every thing was done in this case, that the party had a right to expect. And I presume the verdict of the jury, was not at all influenced by that testimony.

The second ground, contains a very well settled rule of law, that the declarations of a person shall not be received in support of his own title. But the declarations of a party when accompanied by an act may be received as explanatory of that act, as constituting a part of the *res gestæ*. The plaintiff had produced in evidence an acknowledgment of the witness, that he would become his tenant, thereby admitting the right of the land to be in him. The defendant had a right therefore, to give in evidence his declarations as to his motives and the manner of his tenancy as explanatory of that act. The defendant could not have called Spear as a witness, because he had an interest in supporting his title, as it went to discharge a debt which he would otherwise have continued liable to pay.

3rd The plat of resurvey was not offered as evidence of title but as defining the extent of defendants possession. And for that purpose it was certainly admissible.

4th. and 5th. The fourth and fifth grounds presented questions for the consideration of the jury, in which the court is not disposed to interfere.

6th. With regard to the sixth ground, it is a very familiar principle that a record cannot generally be given in evidence to affect any but such as are parties or privies to it. But there are exceptions to that rule; as when it constitutes a link in a chain of title, or goes to establish a collateral fact. In the case now under consideration, the plaintiff claimed under Spear, under whom the defendants claimed as his tenant, and contended therefore that defendants could derive no title from him. To rebut that evidence the record was produced to shew that Spear had actually been divested of his right before he acknowledged the right of the plaintiff. It was not offered as evidence of defendant's title, but to shew that, from the circumstances of the case, and the relation in which Spear stood to the parties, at the time, his acknowledgements could neither weaken the title of one nor strengthen that of the other.

7th. There does not appear to be any thing in the instructions of the judge to the jury which will authorize the interposition of this court.

8th. With regard to the verdict, it belonged to the jury to determine the extent of the defendant's possession. No colour of title is necessary to give a party a right by possession. The object of the law is to quiet persons in their possessions. After the quiet enjoyment of land for five years, the law presumes a title in the occupant, which may have been lost by accident. The possession is substituted in the place of title. Color of title, I think, at best, a far-fetched figure, and difficult to define; perhaps, however, it is the best that can be used in reference to the subject to which it is applied. I think that in its common acceptation it is understood to mean any semblance of title by which the extent of a man's possession can be ascertained. An actual deed from a person who has no right conveys nothing. It is not exclusive evidence of pos-

session. The possession being proved by other evidence, the deed is only looked to as defining its extent. And for that purpose a mere survey is evidence of as high a nature. Suppose a person to be in possession of a town lot, the limits of which are known by a general map of the town, or a tract of land well known by a particular name; as for instance Tickleberry or Palmyra, the bounds of which are well defined by distinctly marked lines, it would be sufficient to authorize the jury, from the possession of a part, to find a verdict for the whole, even though the possessor should have neither deed nor plat. And, for the most obvious reasons. A single deed or plat is as susceptible of destruction by fire or other accident as a complete chain of title. Whenever therefore, a person holds by possession only, a deed, plat, or other color or semblance of title, will usually furnish of itself sufficient evidence of the extent of his possession without any other. When he has not such evidence he may resort to any other, such as visible marked lines, adjacent lands, ditches, fences, or any other that shall be satisfactory to the mind of the jury. In the present case the evidence both with regard to the nature of the tenure, as well as the extent of the possession, were somewhat of an equivocal character. But they were questions for the consideration of the jury. If the verdict had been the other way, perhaps the court could not have said that the jury had done wrong: neither can they now say that they are dissatisfied with the verdict. The plaintiff has certainly been very negligent in delaying so long to prosecute his claim. These stale demands are not to be encouraged. Nothing tends more to disturb the quiet and repose of the community. Families are broken up, purchasers disturbed in their possessions, and creditors, who have trusted others upon the credit of their long possessions, are disappointed in their just expectations by some dormant claim which could not have been anticipated.

Upon the whole, the court do not see any ground upon which the plaintiff can claim a right to a new trial. The

questions of law and fact were so blended together that the court below had a much better opportunity of forming a just estimate of the merits of the case than could possibly be afforded to this court.

The motion therefore must be refused.

A. W. Thompson, for the motion.

Earle and Henry, contra.

HUGH BARKLEY vs. JAMES BARKLEY.

There are two classes of cases in which parol evidence is admissible to explain or carry into effect a deed.

One, where the deed refers to any thing, of which it does not itself furnish evidence; as where a person sells *all the slaves* he owns at A. parol evidence may be given to prove the number he had at the place, at the time. Or where a man sells "his share of his fathers estate," it is admissible to prove how much he was entitled to. (a)

The other class, is where the deed upon its face is certain but some ambiguity is raised by parol, there the ambiguity may be removed by parol.

Where a sheriff levied on "one hundred acres, *more or less &c. being a part of an undivided tract, &c.*" and in his deed described it as "one hundred acres more or less, of land belonging to the *estate* of John Miller, dec'd." parol evidence is admissible to shew how much the *undivided part* was.

But as the deed conveyed one hundred acres it could not be proved by parol, that the defendant had one part by inheritance and another part by purchase, of *thirty acres each*, and that *only that part* was sold, which he inherited, as it would be contradicting or explaining the deed, *the deed conveying more than both put together*. But it would have been an ambiguity explainable. if the deed conveyed *less* than the two shares, and defendant might then, prove which share was sold.

When an ambiguity is created by parol, and the deed itself removes the ambiguity, parol cannot be admitted to control the deed.

(a) The general rule is, that where there is any doubt as to the *extent of the subject* devised or sold, it is a matter of extrinsic evidence to show what is included under the description, as parcel of it. See 3 *Starkie on Evid.* 1026. He cites *Doe vs. Burt*, 1 T. R. 701. *Beaumont vs. Field*, 1 B. and A. 247. *Herbert vs. Reid*, 16 Ves. 481. See also *Dolan vs. Briggs*, 4 Binney 496. *Jackson vs. Croy*, 12 Johns. 427. *Barrett vs. Barrett*, 4 De Saussure's Rep. 447. *Snyder vs. Snyder*, 6 Binney 488. *Jackson vs. Bower*, 1 Caines Rep. 358, and note of cases. *Hamilton vs. Carwood*, 3 Har. and M'Hen. 437.

This was an action of debt, tried before Judge Gantt, at Fairfield, Spring term 1825.

John Miller died intestate leaving a widow and several children, possessed of a tract of land containing about 400 acres. By virtue of a writ of partition, in the court of common pleas, the land was sold for partition among the heirs at law, and those representing them, some of whom had sold their shares, and some were levied on and sold by the sheriff before partition, and the purchasers represented the heirs whose shares they claimed in the proceedings in partition, most of which the defendant had bought in, and had deeds of conveyance for them. The whole tract was sold by the sheriff to the plaintiff, under an order from the court, on a credit. The defendant produced and proved his several titles for the distributive shares of some of the heirs at law, which were allowed him at valuation, *pro rata*.

The principal question arose on the discount for the share of John Miller, a son and distributee of the deceased.

One Absolom Simonton had obtained a judgment against John Miller, the son, who inherited a share, and who had previously purchased a share from Caldwell and wife. Before partition the sheriff levied and sold John Millers undivided share of the land, expressing it to be 100 acres, and made the deed accordingly to A. Simonton, the plaintiff, who was the purchaser for \$ —, as stated by the sheriff on the *fi. fa.* which was also the consideration mentioned in the deed. Defendant produced a deed from Simonton, conveying the land, so purchased, to defendant, which he alleged, conveyed and passed *all the interest* which John Miller, the son had, to wit: *two shares*.

The plaintiff contended that the levy, and the description in the deed, were not sufficient to pass more than *one share*; that the expression of "one hundred acres more or less" did not alter the meaning; more especially as it clearly appeared, that the quantity of acres nominally mentioned in the levy on the *fi. fa.* from which the deed had been written, was in figures,

and plainly appeared to have been originally 50, and altered to 100. That there were no words in the levy or the deed authorizing the construction, that it passed *all the interest* of Miller. Likewise that the description was at least ambiguous and uncertain; and he offered parol evidence to prove that there was, in fact, only one share levied on and sold. This he said could be proved by the crier and many other by-standers. The plaintiff also offered to prove the fact, that the same sheriff, soon after, did levy on the share of Caldwell and wife, as the property of John Miller, on another execution, which was paid off by John Hollis, who had afterwards purchased it from John Miller.

The presiding judge rejected the evidence, and instructed the jury, that the description in the deed clearly shewed, that *all the interest* which John Miller had in the land, was levied on and sold; and that the evidence could not be received, inasmuch as the effect of it would be to contradict the deed.

The jury, according to the charge of the court, found for defendant.

The plaintiff moved for a new trial on the following grounds:

1st. Because the description of the land in the levy and sheriff's deed can only mean the share inherited by John Miller, and not the share or part he purchased from Caldwell and wife.

2nd. Because the deed and the levy were expressed in terms so ambiguous as made it a proper subject for explanation by parol evidence.

3d. Because the terms of the levy and deed, and other circumstances, on the face of the written evidence, clearly showed that there was no more than one share sold.

NOTT, J.—The principal question in this case, is, whether parol evidence ought to have been admitted to shew that the sheriff had levied on and sold the part of the land only which John Miller acquired by descent, and not that which

he acquired by purchase. There are two classes of cases in which parol evidence is admissible to explain or carry into effect a deed. One is where the deed itself refers to any thing of which it does not itself furnish evidence. There parol evidence must necessarily be resorted to. Thus if a man should sell all the slaves which he owned at a particular place, parol evidence must necessarily be admitted to prove the number of slaves which he had at that place at the time. So if a man should convey the share of his fathers estate to which he was entitled by inheritance, parol evidence must necessarily be admitted to show how much he was thus entitled to.

The other class of cases is where the deed upon its face is certain, but some ambiguity is raised by parol evidence, there the ambiguity may be removed by parol also. Such is the case put in the books where a man devised land to his son John and it appeared that he had two sons of that name. In that case parol evidence was admitted to shew for which of the sons the devise was intended. The case now under consideration, appears to me to come within both the classes which I have mentioned.

The levy on the execution is in the following words: "Levied on 100 acres of land more or less whereon the defendant now lives being a part of an undivided tract adjoining lands of &c." The sheriff's return of the sale is in the following words: "I have sold the above described tract or plantation of land." In the deed he describes it as a tract of land containing "one hundred acres, more or less," being the "undivided part of a tract of land belonging to the estate of John Miller deceased." If this deed had mentioned one hundred acres, without any qualification, there would have been no ambiguity on its face. But it is for one hundred acres "more or less, being the undivided part, &c." The object was to sell that part of the undivided tract of land which belonged to John Miller the son. But being uncertain how much his part would be, it became necessary to resort to

parol evidence to establish that fact. With regard to the admissibility of that testimony there was no question. But the parol evidence created another ambiguity which has given rise to the question now under consideration. It was discovered that John Miller was entitled to one share by inheritance, being thirty acres, and another by purchase, which together would make sixty acres. And now the question occurs, whether parol evidence shall be admitted to prove that the sheriff levied on and sold only the thirty acres which he was entitled to by inheritance. The rule that where an ambiguity is created by parol it may be removed by parol was never intended to violate the other rule of law, that a deed shall not be contradicted or explained by inferior testimony. If, therefore, when an ambiguity is created by parol the deed itself removes the ambiguity it cannot be controlled. Thus if a man convey to his son John a house in the town of Columbia, "being the house in which he now lives," proof that he had two sons of that name would render it uncertain which of the two was meant. But if by the same testimony it should appear that one of those sons was in Europe at the time the deed was made, and the other living in the house, the deed itself would remove the doubt of its being made to him who was then living in the house. Let us test the case now before us by those rules? The undivided part of the land which John Miller owned contained sixty acres. Thirty by inheritance and thirty by purchase. The deed conveys one hundred acres more or less. Now, although it was uncertain how much was conveyed until it was ascertained by parol evidence how much John Miller owned of the undivided tract, as soon as it was ascertained that he owned sixty acres, and that one hundred had been conveyed, the ambiguity was removed; because the deed contained more than both his shares amounted to. If the deed had been for fifty acres, and it had been shown that his inheritance amounted to only thirty, but that he had acquired as much more by purchase the ambiguity would still have remained. For in one view, it would

have been too little, and parol evidence, therefore, might have been let in, to have removed the doubt. But the deed, in this instance, removes the doubt; as it conveys *all* that he owned within one hundred acres; which embraced both shares. And to have admitted parol evidence to prove that a part only of what John Miller owned, was intended to be conveyed when the conveyance embraced all and more than all that he owned, would have been a direct contradiction of the deed itself.

But it is contended, that as the number of acres mentioned in the levy is in figures and appears to have been altered from fifty to one hundred, parol evidence ought to have been admitted to account for that alteration. There is some appearance of such an alteration having been made. But if so, it has been made by the plaintiff himself; for the execution has always been in his own hands. And in the deed, which was made by him in pursuance of that levy, the words "one hundred acres," are written in full, which furnishes higher evidence of the levy and sale than could be derived from oral testimony. I am of opinion, therefore, that the parol evidence was properly rejected, and that this motion must be refused.

Peareson and Clendinen for the motion.

Clarke contra.

M. SOLOMAN vs. S. EVANS.

The plea of *non est factum*, to a bond, only puts the *factum* of the bond in issue, and the defendant, under such a plea, cannot object that the bond was illegally assigned to the plaintiff.

When the sheriff assigns a bail bond to the plaintiff, under the statute, 4 Anne c. 16, it must be done under his hand and seal, with two subscribing witnesses.

A date is not indispensably requisite to a bond, as it takes affect from delivery, as in case of all deeds, and it is admissible, by parol, to prove that it was delivered on a different day from that on which it is dated.

JOHNSON J.—In addition to the facts reported, it is agreed that the defendants had pleaded the general issue only; so that the grounds of the present motion are resolved into the following propositions.

1st. Admitting the assignment by the sheriff to be irregular, can the defendant take advantage of it under the plea of *non est factum*.

2nd. Does the circumstance, that the date of the bond was not filled up, until after it was signed by Mrs. Gamble, affect its validity?

1st. The statute of 4th Ann. c. 16, made of force in this state, (*Pub. L.* 96,) requires that the sheriff shall, at the request of the plaintiff, assign to him the bail bond, by “ endorsing the same, and attesting it under his hand and seal, in the presence of two or more credible witnesses, &c.” and authorizes the plaintiff to bring an action in his own name on such bond so assigned. The assignment made on the bond in this case was not under the seal of the sheriff, and was made in the presence of one witness only; consequently it is irregular; and it may well be doubted, whether the plaintiff was entitled to bring an action upon it. But the defendant has waived any advantage which he might have had by his plea. The general issue only puts the *factum* of the bond in issue, and it was all that the plaintiff was required to prove. The case of *Smith vs. Whitehead*, (cited, 1 Selwyn, N.P. 610,) is directly in point. It is, indeed, a precisely similar case, and is conclusive on this question.

2nd. Whatever influence the want of a date to the bond might have had as to the defendants co-obligors, he can derive no benefit from it. The act of filling up the blank was cotemporaneous with his signing it, and, as to him, it is the true date. But it is not true in point of law, that a date was indispensable. A bond, like any other deed, can take effect only from its delivery. Hence it is admissible to prove by parol, that it was delivered on a different day from that on

which it is dated; and, for the same reason, it would bind from the delivery, although it was without date.

Motion granted.

J. B. Miller and Mayrant for the motion.

Wm. F. DeSaussure.

DANIEL M'KIE vs. JOHN GARLINGTON.

The granting of a new trial is matter of discretion, and will not be exercised where the court sees that justice has been done.

So, in an action to try titles, where the original defendant was tenant to the plaintiff and had no right to dispute his title, and a motion was made by a third person to come in under the rule of court, as the real defendant, and the court refused the evidence of tenancy, but suffered the third person to come in and defend, and upon the trial it appeared that the plaintiff had no title, the court said, although the evidence of the tenancy should have been admitted, and if proved the court thought the second defendant should not have been allowed to come in, yet justice having been done, a new trial would not be granted.

This was an action of trespass to try title. It was originally commenced against Alexander Winn. But at some court previous to the trial the present defendant came into court and moved that as Winn disclaimed any title he might be substituted defendant in his place, alleging that the right of the land was in him. That application was resisted on the ground that Winn was the tenant of the plaintiff, and therefore, could not dispute his title, and that the plaintiff ought not be placed in a worse situation by substituting the defendant in the place of Winn.

The presiding judge required the parties to lay affidavits before him respecting the tenancy; which being heard he granted the motion.

At the last term the cause came on for trial before Judge Gaillard, who made the following report:

“Garlington having been made defendant by order of the court, I considered him as the real defendant. He derived his title from Brooks, to whom M'Kie sold the land.

Brooks paid part of the purchase money, \$300, in his life time. Boyd a witness borrowed from Brooks \$80 which Brooks told him to pay to M'Kie, which he did. Mrs. Brooks after her husbands death paid M'Kie \$420 and took titles from him; \$800 was the price of the land. In order that M'Kie, might befriend her and protect the land against Garlington's claim, she delivered her titles to him and he retains them. I said to the jury that if they believed from the evidence that M'Kie had been paid for the land they ought to find for the defendant; which they did."

The plaintiff moved for a new trial, on the ground that his honor rejected evidence offered by the plaintiff to shew that Alexander Winn went into possession under him, and suffered the defendant Garlington to set up an adverse title without regard to Winn's tenancy.

The plaintiff also moved the court to set aside the order made in this case substituting Garlington as the defendant.

NORT, J.—I think that if I had presided at the trial of this case, I should have permitted the fact of Winns tenancy to have been given in evidence. I do not think that the plaintiff ought to have been placed in a worse situation by the substitution of another defendant, if Winn were really his tenant. The question of the tenancy and title might both have been left to the jury, together. But the question comes before the court, now, after a verdict and after an investigation of the whole title. And we now see that the plaintiff could have had no rightful possession. The possession which he pretended to have gained was by intrigue and directly in the face of his own deed. The granting of a new trial is a matter of discretion, and will not be allowed where the court sees that justice has been done. And, much less, will it be done, to enable the party to effect a most palpable fraud. The plaintiff had sold the land, had received the money, made the title, and put the party into possession. Under a pretence of protecting a friendless

woman he prevailed upon her to deliver up the title to him, which he detained, and then put a person in possession to hold for himself against her. And now he says, he is my tenant and must not be allowed to dispute my title! Under these circumstances he would be considered as the agent of Mrs. Brooks, and the person in possession as her tenant. And as the defendant derived his title from the plaintiff, through Brooks, to whom he had sold, he is entitled to retain his verdict.

The motion therefore, must be refused.

Farrow for the motion.

O'Neill contra.

VEALE vs. HASSAN and ARCHER.

After the dissolution, one partner cannot bind the other by a new contract; but the promise of one will prevent the operation of the statute of limitations.

This was a summary process, for use and occupation, and for a small account for goods sold and delivered, against the defendants, as partners. The facts are sufficiently detailed by the court, for a proper comprehension of their judgment.

Peareson for the motion.—Cited 2 *Johnson's Rep.* 300. 4 *Do.* 24. 3 *Do.* 530. 3 *Esp. Rep.* 101. 1 *McCord's Rep.* 388. *Selwyn* 107, that one co-partner cannot bind the other after the dissolution.

The acknowledgements of one partner takes a case out of the statute, after the dissolution. (*Smith vs. Ludlow*, 6 *Johns.* 267. *Beitz vs. Fuller*, 1 *McCord* 521. *Briggs vs. Ex'rs. Starke*, 2 *Const. Rep.* 111.)

JOHNSON, J.—The plaintiff's demand against the defendants, independent of the acknowledgements of the defendant Archer, was full and satisfactory, and according to the explanations admitted at the bar, they were only used to take

the case out of the statute of limitations, which had been pleaded in bar; so that the question whether one partner can bind another by a contract after the dissolution of the partnership, which comprises all the grounds taken, does not arise out of the case. But the negative of this proposition is too clear to admit of doubt. One partner cannot bind another by a new contract made after the dissolution of the partnership. As well might one stranger bind another to pay his debt. (2 *Johnson* 300. 4 *Do.* 224. 3 *Do.* 530. 1 *Mc Cord* 388.)

There is as little difficulty in determining that a promise made by one of several partners will prevent the operation of the statute. It was so decided in the case of *Smith adm'r. vs. Ludlow*, 6 *Johnson Rep.* 277, and is in accordance with the opinion of the constitutional court in the case of *Bietz adm'r. vs. Fuller*, 1 *Mc Cord* 541, where it was held that a promise made by one of several makers of a promissory note, would take the case out of the statute. And the case of *Briggs vs. Ex'ors. of Starke*, 1 *Const. Rep.* 111. is decided on the same principle.

The circumstance that Archer was insolvent at the time he made the acknowledgements, which is made the foundation of the second ground, can have no effect: He was not for that cause the less capable of admitting the truth, nor the less worthy of credit; unless indeed Hassan had proved that it was fraudulently done with a view to charge him; of which there is no pretence. That evidence was therefore properly rejected as irrelevant.

Motion refused.

Peareson for the motion.

Clarke contra.

BENTS EX'OR. vs. GRAVES.

A plaintiff has no right, without the consent of the defendant, by giving credit, to reduce his demand within the summary process jurisdiction. The parties, by mutual consent, cannot give jurisdiction, much less can one, without the consent of the other. So, the plaintiff cannot by releasing part of his demand, reduce his cause of action within an inferior jurisdiction.

This was a summary process on promissory notes. The objection was to the jurisdiction, on the ground that the amount exceeded it. The facts will appear, in the judgment of the court.

JOHNSON, J.—The principal sum purporting to be due on the notes on which this action was brought was confessedly above the summary jurisdiction of the court. Say \$114. The plaintiff without the knowledge or consent of the defendant endorsed on them a credit of \$56,44 Which he admitted to be due by him as the executor of William Sims to the defendant; and the question now submitted is, whether he was not at liberty so to endorse the credit and sue in the summary jurisdiction of the court for the balance \$57,56?

That parties cannot even by mutual consent, give to the court, as such, jurisdiction in a matter which is excluded by the laws of the land, may be regarded as a settled axiom. All their powers are derived from this source. Hence the inevitable conclusion that one of the parties cannot give jurisdiction by his own act. And on this principle it has been ruled in this court that the plaintiff cannot release or abandon a part of his demand and maintain an action in the summary jurisdiction for the balance. (1 *Nott and Cord* 192. *Const. Rep.* 478. *Tredways Ed.*)

In the case under consideration there is no act of the defendant from which the court can see that he had any demand against the plaintiff, and the credit indorsed may be voluntary; and on the other hand we cannot know but that he

may demand double the amount credited, the rule therefore applies.

Motion refused.

P. Farrow for the motion.

Irby contra.

THE STATE BANK vs. THOS. BAKER.

A second writ cannot be considered as an *alias*, if it be issued more than a year and a day after the first, and all the *intermediate* writs must be regularly lodged with the sheriff, and cannot, at a subsequent period, be made out, so as to fill up the intermediate numbers, to prevent the statute of limitations.

This was an action of assumpsit on a promissory note, which became due 1st Jan. 1815. An original writ was sued out on 30th Dec. 1815, which was returned *non est inventus*. A second writ, entitled a *pluries*, and on which these proceedings were founded was issued, returnable to October term, 1819. The defendant pleaded the statute of limitations. Plaintiff replied an original sued out within four years, and continuances down to the second writ. On which defendant took issue.

To support the replication, plaintiff offered in evidence an *alias*, and *pluries* writs returnable to all the terms intervening between the first and second writs, which had been made out by the attorney, and signed by the clerk after the return of the second writ; but had never been lodged in the sheriff's office.

The presiding judge, being of opinion that the replication was not supported, nonsuited the plaintiff; and this was a motion to set aside the nonsuit.

JOHNSON, J.—The position contended for in support of this motion is, that on the return of a *pluries* writ, at any time within four years, after the return of an original, the plaintiff may connect them together, by making out the con-

innuances out of court, or issue the intermediate writs, and thus save the bar of the statute; and it would seem that this practice is supported by the English authorities. The reasons on which it is founded, are the expence and inconvenience of purchasing a new original, which do not apply to the state of things existing here, and a different practice prevails.

The case of *Parker vs. Grayson*, (1 Nott and McCord 173,) is decisive as to this. There, nearly four years had elapsed between the return of the original and the suing out the *alias*, and the court say that no fiction of law can connect them together, where more than a year has intervened. The same state of facts exists in this case, and the same rule applies. Motion refused.

Wm. F. DeSaussure and James Holmes for the motion.
S. D. Miller contra.

MEANS and al. vs. MOORE and al.

A very unimportant matter may suffice to make out a case of obliteration in a will, if it appear to have been *animo revocandi*.

Where the *animo revocandi* is doubtful, the party that alleges it must prove it. It is not enough that a testator intended to revoke his will. He must execute some one of the acts, prescribed by the statute, to effectuate his intention of revocation.

Testator intending to alter his will, and make a new one, gave directions for that purpose to witness, as he read over the will to him. The witness made memoranda by interlining the proposed alterations in pencil, for his own convenience. One word was scored through with the pencil. Testator not having completed his directions the first day, was unable from weakness to complete them on the second, and the new will was never drawn: Held no revocation, the obliteration not being made by the direction of the testator, nor intended to revoke the whole will.

A verdict without evidence is contrary to law, and the court will always exercise the controlling power of granting new trials; and a similar finding of a second jury cannot alter the law; and the court will continue to grant new trials. (a)

(a) See *Silva vs. Low* (1 Johns. Ca. 336.) The decision of the Appeal Court, granting the new trial, unless new evidence be given, becomes

Tried before his honor Judge Gaillard, at Spartanburgh Spring Term, 1825.

This was originally an appeal from the Ordinary of Spartanburgh district, who had admitted to probate a paper dated 29th of October, 1817, which was executed in due form to pass real and personal estate, and purported to be the last will and testament of Gen. Thomas Moore dec'd. It was contended before the ordinary, that the will had been revoked by the acts of the testator in his life time; and the same question was brought before the court below on an issue by suggestion. The jury, in 1824, found against the will, and the appeal court, sent the case back for a new trial, *Harper's L. R.* 314,) and the new trial now came on.

The will, on its production to the court, appeared perfect in every respect, and free from any marks of burning, tearing, cancelling or of obliteration, except that in one clause the word *man* had been scored through with a pencil.

The following testimony was offered: The first witness, Andrew Barry, proved that he went to the house of the testator to see him, during his last illness, and a few days before his death. He informed witness, in answer to some inquiries, that he had made a will, which was at Dr. Moores. The witness then asked him if he had provided in it for his youngest daughter, who it appeared had been born after the execution of the will. The testator was uncertain. The will was procured by the witness, with the testators consent, for the purpose of ascertaining that fact only. Had it been known that she was provided for, it would not have been sent for. After the will was brought, the testator began to read it, but soon desisted from weakness, and requested witness to read it aloud, which he did, and when he had finished, the testator said, "it is true she is not provided for." Witness

the law of the case, and the appeal court must continue to grant new trials, toties quoties, or give up its dignity and the law to the will of the jury. See *McGrath and Jones ads. Isaacs*, 2 *McCord* 26. *Turnbull vs. Rivers*, Ante 132. *Moore vs. Cherry*, 1 *Bay* 269. R.

urged on him the necessity of making another will to provide for his youngest daughter; and asked the testator if he (witness) could be of any use in preparing another will. Testator said, "Yes;" and directed the witness to procure a pencil, and he would shew him how to make the necessary directions or memoranda for the new will. The witness got the pencil, and the testator took the will and directed him to *underscore* such pieces of property as were to be stricken out of any clause, and *interline* such as were to be inserted in the new will. The witness proceeded with the pencil, in the mode pointed out, through several clauses of the will, and made the interlineations. In making the interlineations, the witness did not use the testators words, but the substance only. They were made by and according to the testators directions, but *expressly for the witness's own convenience, to enable him to draw another will. They were not intended to stand as alterations on this will, or to deface it:* and this mode was adopted as the earliest and shortest way of making out the necessary directions for the new will. After going through several clauses, in this way, the testator said, he was unable to proceed, and told the witness to stop. Witness asked if he should call next day to finish the business; to which he assented. The witness attended accordingly, but found the testator too ill to resume the subject, and nothing more was done. After his death, which took place a day or two afterwards, *the pencil marks were rubbed out by the general consent of the family, Roddy, Means, the executors and others, or witness said he would not have felt authorized to rub them out. A copy, was made to prevent dispute. The witness thought the testators only object was to provide for his youngest daughter, and the alterations proposed were calculated and intended to create a fund for that purpose. Many clauses remained untouched, and no intention was expressed to alter the disposition of the real estate. The testator did not direct any word of the will to be erased or obliterated, nor did he know that any erasure was made. He never saw the will*

afterwards: he did not say he revoked it, or intended to revoke it; nor did he direct it to be cancelled or destroyed. The testator did not intend to die without a will. The witness considered the business as wholly in an unfinished state, and that he was to call again to complete the directions for the new will. The testator during the course of the interview spoke of some alterations he wished in the legacies to Mrs. Barry, and Mrs. Roddy. Some three or four years before his death, the testator said to another witness that he had made a will but was not satisfied with it, and intended to alter it. He said his youngest daughter was not provided for; he seemed to be uncertain, whether the law would provide for her. He spoke, also, of the increase of his property as a reason, and that Mrs. Barry had a girl in her possession which he wanted to give her.

It was also proved that the testator, since the execution of the will, had disposed of some Mississippi stock.

His honor stated to the jury, that he did not consider the acts of Gen. Moore as amounting to a revocation, and that the Constitutional Court, having decided in favor of the will, on a state of facts differing in nothing material from that before them, the decision of the court ought to be regarded as conclusive.

The jury found against the will.

A motion was now made, to set aside the verdict, and for a new trial on the following grounds:

1st. That the acts performed by the direction of the testator are not embraced within the statute of frauds, or the act of assembly and do not amount to a revocation.

2nd. That the intention to revoke, if there was any, was not absolute, but conditional only, depending on the execution and substitution of another will, which was never perfected and therefore no revocation took place.

3rd. That the revocation was partial only, and not total.

4th. That the verdict was most manifestly and palpably contrary to law and evidence.

Thomson against the motion—Said a subsequent devise, though inoperative, will amount to a revocation. (5 *T. R.* 128. 1 *Roll.* 615. 3 *Wilson* 313–315.)

Revocation was a fact for the jury. (*Powell on Devises* 634.)

JOHNSON, J.—For the doctrine of law, applicable to the grounds of the present motion, it will only be necessary to refer to the opinion of the Constitutional court, when this case was formerly before it. (*Harpers L. R.* 314.)

One of the means provided by the act of the Legislature, (*Pub. Laws* 491,) to revoke a will regularly executed, and that alone on which the counsel opposed to the motion rest the case, and the only one which in truth arises out of it, is that of obliterating it.

It never yet entered into the mind of any lawyer, that an accidental or unintentional obliteration amounted to a revocation. All agree that the act must have been done *animo revocandi*, to make it effectual.

Without entering into a minute enquiry as to what will or will not amount to the act of obliteration, it may be conceded and perhaps on good authority, that a very unimportant matter may suffice, when the intention is manifest, (*Brailsford vs. Johnson*, 2 *Nott and Mc Cord* 272.) And for the purposes of this case it may be admitted, that the under-scoring and interlineations made by the witness, Mr. Barry, and the erasure of the words *man* in one place, and *woman* in another, as stated in the argument, did amount to the act of obliteration, within the meaning of the statute; and this is all that can be reasonably required; and the case is resolved into the single question of fact *quo animo* were these things done.

The plaintiff affirms that they were done *animo revocandi*, and it is incumbent on him to prove it. Is there any circumstance or expression from which it is possible to decide it? There is none!—On the contrary the witness Mr. Barry,

states that they were made, "expressly for the witness's own convenience, to enable him to draw another will. They were not intended to stand as alterations, or to deface it. The alterations proposed were calculated and intended to create a fund," as a provision for a daughter born after the execution of the will: "The testator never saw the will afterwards: he did not say he revoked it, or intended to revoke it, nor did he direct it to be cancelled or destroyed." If we take these expressions literally, they certainly furnish no proof of the fact sought to be established by the plaintiffs. If they are taken in connexion with the state of testators affairs, which is certainly the more correct mode, the same result follows:

The birth of a daughter, after the execution of the will, and additions to his fortune, had, it is admitted, determined the testator that some modifications in his will were necessary; and the erasures, interlineations, and under-scoring of the will in question, were avowedly intended as a guide to Mr. Barry in the preparation of a new will; and furnish satisfactory proof that it was his intention to revoke the old. But this is not enough. Some one of the acts provided in the statute must have been done with a view to give effect to the intention. (b) And it is evident that he looked to the execution of the new will as the means of effecting it, and it has been before shown that there was no other act done with a view to effect that object.

It is objected, that, as a question of fact, the verdicts of two distinct juries, are conclusive against the motion; and that sending the case back would be unwarranted interference on the part of the court with the right of trial by jury.

The court feel sensibly the importance and delicacy of this objection; but whilst we bow with profound respect to

(b) See the *third* clause of the act, (*Pub. Laws* 491,) which corresponds with the *sixth* clause of the English statute of frauds. Though the provisions of our statute of wills, generally, correspond with those of the statute of frauds, in relation to wills, yet the two legislatures have expressed themselves in different words, and the careful lawyer will always choose to refer to his own statute.

the finding of a jury, in matters within their peculiar province, as the great bulwark of our lives, reputation and property, we yet feel bound to maintain the supremacy of the law.

The court need not resort to a metaphysical argument to prove that a verdict without evidence is contrary to law. The right to control a verdict under such circumstances has always been claimed and maintained in this and in every other country where the law have been properly administered; and of this our own courts furnish many instances. (*1 Bay 269. 2 Do. 23-131.*)

This, as has been before noticed, is the second time that this case has been before the court, and the probability is, that all the facts that exist have been fully developed, and as the court are bound by the rules of law to maintain the ground taken, it is submitted whether the parties would not consult their own interest and the public convenience by putting an end to a course of litigation which must in the end prove unprofitable.

Motion granted.

Harrison and Earle for the motion.

Williams and Wallis Thomson, contra.

DANIEL SMITH vs. THOMAS McMASTERS.

If the plaintiff sue in the general jurisdiction of the circuit court, for a sum above the summary process, and it appear that the debt sued for has been reduced by *direct payments* within the summary jurisdiction, he can recover but sum. pro. costs; but if it be so reduced by discounting on the trial an *independent demand*, full costs are allowed.

And where the plaintiff sued for a sum above the *sum. pro.* jurisdiction, and it was reduced to 75 cents by the discount of an *independent demand*, yet the court allowed full costs.

The plaintiff brought his action by *sum. pro.* for about \$48. The defendant pleaded a discount. On the trial of case, the plaintiff recovered seventy-five cents by a decree of the court. The clerk taxed against the defendant the plain-

list's cost. A motion was made to set aside this taxation, which the court refused. The defendant appealed, on the ground, "that the plaintiff was not entitled to any cost under the statutes of this State, unless he recover £20 old currency, or unless the action is brought to try the right to property. And that the defendant having established his discount could make no difference. At least no provision was made by law, for such a case."

Bauskett, for the motion,—referred to the act of 1747 (1 *Brev. Tit. Costs*.) He said, the only condition on which the act gives the plaintiff the right to recover costs is the amount which he recovers. The discount law was silent as to costs.

Caldwell contra,—cited *Hill vs. Williams*, 2 *Bay Rep.* 443.

JOHNSON, J.—The principle involved in this case has been settled in the case of *Levy vs. Roberts*, 1 *McCord* 395. The rule there laid down is, that if the plaintiff sue in the general jurisdiction for a sum exclusively within it, and it appear that it has been reduced by direct payments within the summary jurisdiction, he shall recover only summary process cost, but if it be so reduced, by discounting an independent demand, he shall recover his costs. The same rule is also laid down in the case of the *Cambridge Association, vs. Nichols*, (1 *Rep. Const. Court, Tread. Ed.* 121) and the reasons on which the court proceeded in those cases are, that as in the former case, of direct payment, the Plaintiff must of necessity know the precise amount, and might therefore accommodate his action to the jurisdiction to which it belonged by such deduction; and in the latter might be ignorant of the amount, and the defendant having the election to discount it or not, it would be unjust not to allow the costs of that jurisdiction to which the plaintiff was driven by necessity.

This reasoning applies with equal force to the present case. The debt claimed by the plaintiff was sufficient to carry costs. He could not know that the defendant would elect

to discount his demand. He was driven, therefore, to this action.

But it is objected that the act of 1747 (1 *Brev. Tit. Cost.*) is imperative, that the plaintiff shall not have his costs, unless he recover £20 currency, except in the cases therein excepted.

The question then arises what is the amount which the Plaintiff has recovered in this case? Nominally only 75 cents, but substantially the whole amount of his demand. The discount of the defendant is in nature of an action against the plaintiff in which the defendant recovers that amount which when set off against plaintiff gives the ballance; and in this view the terms of the act have their literal effect; and this is, probably, the true theory of the rule laid down in the cases referred to.

The generally received opinion of the profession, and the practice of the courts, are in accordance with this view of the subject.

Motion refused.

Bauskett and *Dunlap* for the motion.

J. J. Caldwell contra.

STATE vs. D. BECKETT.

Where a sheriff advertises property in a district where a Gazette is printed, he is entitled to receive the costs of printing such advertisement, and nothing more.

When property is for sale by sheriffs in districts where Gazettes are printed the advertisement must be published in one or more of them; and where there are no Gazettes printed, notices must be put up at the court house door, and at two other public places in the district.

And it is not necessary, in districts where Gazettes are published, to give any other notice, than in a Gazette.

But where a Gazette is not published within the district, but there is one within forty miles of the court house, advertisements must be published in such Gazette, as well as at the places in the district.

In all cases where the law requires the publication in the Gazette, the sheriff is entitled to such costs; and where it requires, also, three other adver-

Advertisements in the district, the sheriff is entitled to the fees for such manuscript advertisements.

For advertisements not published in a Gazette, the sheriff is entitled to \$1, for the first time, and 50 cents for each succeeding advertisement in the same case.

Where there are a number of plaintiffs against the same defendant, and his property is advertised under all their executions, the sheriff is still only entitled to the costs of one advertisement; as all the plaintiffs names can be put into the same advertisement.

This case came up in the following manner. Mr. J. G. Holmes took out a rule against the late sheriff David Becket, of Richland district, to shew cause why his costs for advertising property of the defendant, in divers cases, should not be confined to the printers bill alone, for inserting in his newspaper the advertisements.

The sheriff, for cause, by Col. Chappell, submitted, "that in advertising the property of defendants, he is entitled to charge for each advertisement \$1,93, on each case inserted in the advertisement, or, in other words, to \$1,93, per month, in each case in which property may be advertised for sale."

Upon this shewing, his honor Judge Richardson, requested the clerk, Mr. Guignard, to enquire into the facts and to certify them, with his opinion thereon to the court. Mr. Guignard made the following report:

"It appears that David Becket late sheriff of Richland district has charged the sum of \$606,45, for advertising defendant's, (Dr. O'Gilvie,) property in the Gazette, for the years 1822, 1823 and 1824; which amounts to nearly as much as the printer has charged the sheriff for all the advertisement in those three years, of which, those that O'Gilvie was interested in, could constitute but a small proportion.

"Mr. Becket's bill is too general for me to make an exact statement. It appears that he has advertised property of O'Gilvie for sale at the suit of several plaintiffs, say six or more different plaintiffs, which did not occupy in the Gazette more than one square, for which the printer has charged one

dollar fifty cents, for three publications. Mr. Becket has charged the defendant that price in each case. Say, if six cases, the sum of \$9; which the clerk deems an overcharge; as in his opinion the sheriff has no right to charge the defendant with more than the amount paid the printer.

There is some difficulty in ascertaining the proper mode of advertising. In this district where there are Gazettes, there is, it seems, no necessity for the sheriff to put up written notices in three public places, in addition to advertising in the Gazette; but in the act of 1808 (*page 49*,) it is expressly declared that the sheriff shall advertise in the public Gazette, and also advertise as heretofore. Agreeably to which it appears that the sheriff is bound to advertise three weeks in the public Gazettes, and also, advertise at three public places in the district. And if so the sheriff ought to be entitled to one dollar for three manuscript advertisements in each case, and also the printers charge for advertising.

James S. Guignard,

Clerk of Richland district.

"I consider the principle laid down by the clerk correct; but if the sheriff did not actually advertise in manuscript, he is not entitled to any costs therefor.

J. S. Richardson,

Columbia, April 1825."

The defendant O'Gilvie, appealed from the opinion of the circuit court on the grounds:

1st. That the sheriff of Richland district, where a Gazette is published, is not required to advertise in manuscript, at three public places in the district, but is only required to advertise in the Gazette, and consequently is not entitled to costs for advertising at three public places.

2nd. That if the sheriff of Richland district, is entitled to charge for three public advertisements in manuscript, yet he is not entitled to charge \$1, on each case, under which the same property is advertised for the same sale day.

The sheriff appealed from the foregoing decision, and

moved this court to order the clerk to retax his costs so as to allow him \$1,50 on each case advertised in the papers for each month.

Or, if that should not be done, then he moved this court to order the clerk to allow him \$1 for the first advertisement, and 50 cents for each subsequent advertisement of the same property, in each case in which it was advertised.

JOHNSON, J.—It is not pretended that the sheriff did advertise the property of Ogilvie otherwise than in the *Gazettes* printed in the town of Columbia, and the act of 1808 (2 *Brev.* 226,) referred to in the report, expressly provides, that in such case he shall be allowed to “receive the costs of printing such advertisements, and none other charge for advertising,” which is conclusive on all the questions arising out of the particular case, and it is ordered that the bill of costs be taxed accordingly.

The practice with respect to the other points made in this case has heretofore been very variant, and the court have, therefore, thought it advisable to take this opportunity of expressing an opinion upon it. These points involve the following questions.—

1st. Whether the sheriff is entitled to charge for manuscript advertisements, where a *Gazette* is printed in the district?

2nd. Whether, when manuscript advertisements are necessary, he is entitled to the fee of \$1 for advertising the same property at the same time at the suit of several different plaintiffs?

The solution of the first of these questions obviously depends on the circumstance, whether the sheriff is or is not bound to put up manuscript advertisements in those districts where *Gazettes* are printed.

The act of 1797 (2 *Faust* 147.) regulating the mode in which property taken in execution shall be advertised for sale, provides that when the property is for sale in the district where *Gazettes* are printed, the advertisement shall be pub-

lished in one or more of them "and where there are no Gazettes printed, the notice or notices shall be put up at the court-house door, and two other places in the district &c."

It is not pretended that this act makes it the duty of the sheriff to put up manuscript advertisements where there are Gazettes, but that the words, "and also advertise as heretofore," used in the conclusion of the clause of the act of 1808, taken in connection with it, renders it necessary. But on looking into both the acts and reading them together it will be seen that, the intention of the Legislature was to provide for the publication of advertisements in a Gazette, when there was one printed within forty miles of the court house, although out of the district, and in that case manuscript advertisements are also rendered necessary, and consequently the sheriff's would be entitled to have the printers bill refunded, as also the fee for the manuscript advertisements.

With respect to the second question, it is apparent, whether we regard the spirit or literal interpretation of the act of 1808, that the sheriff is only entitled to the fee of \$1 for advertising for the first, and 50 cents for the each subsequent, sale day of the *same property*, without reference to the number of executions levied on it. And if we regard the reasonableness of the compensation, we cannot but be satisfied with the result. All the service which necessity or usage requires is, the addition of the names of the several plaintiffs at whose suit the property is advertised.

James J. Holmes for O'Gilvie,

J. J. Chappell for Becket.

N. B. The printer's charge for advertizing was stated, by Mr. D. Faust to be "for a square or under, for one insertion 64 cents, for 3 insertions \$1,50:" So that Mr. Sheriff would have made large profits upon this speculation.

R,

WALKER and BRAGG vs. JOHN PARKHAY.

Where an action was brought by two partners, A and B, on a book account and the entries were made by A,—B can not be admitted to prove the entries made by A, unless it be clearly proved that A is out of the State.

This was a summary process to recover a medical account. The services had been rendered, and the entries made, by Dr. Walker, who resided out of the state, but who was within the state during the sitting of the court. Dr. Bragg was offered as a witness to prove the entries, they having been made by his copartner, and his evidence was rejected as incompetent. The plaintiff's counsel then called on defendant to swear if the account was not correct. He deposed that he had never employed Dr. Walker to perform the services charged.

A nonsuit was ordered.

The plaintiff moved to set aside the nonsuit, because Dr. Bragg's evidence was rejected.

NORT, J.—There can be no doubt but that the evidence offered in this case was properly rejected. In the case of *Thomas and Seth Foster vs. Sinkler*, (1 Bay 40,) one plaintiff was permitted to prove the hand writing of the other, being his copartner, who was out of the state. But, that is as far as the decisions of our courts have gone, and farther than I should consent to go, if I did not feel bound by that decision and the practice under it ever since. In this case the judge reports that the co-partner was in the state at the time of the trial. The counsel seem to think that the testimony did not to go so far. They understood the testimony to be that he had been in the state a short time before the court, but that the witness did not know where he was at that time. But, admitting that to be a correct statement of the facts, it would not change my opinion. I would hold the party to strict proof that he was out of the state, before the secondary evidence should be admitted.

The motion is therefore refused.

GOLDTHWAITE vs. DENT.

In a suit in nature of a *quantum meruit* before a magistrate, for work done or services performed, the magistrate does not loose his jurisdiction upon proof that the services rendered were worth from \$15, \$50, or more than the jurisdiction extends to, where only \$20 are demanded; as a person may demand less than his services deserved.

So, it would seem upon a sale of goods, without any stipulated price, the vendor may charge less than they are worth, and sue in an inferior jurisdiction.

A lawyer is entitled to his counsel fee, although he does not argue the case; where an argument was unnecessary. And the facts that two other counsel were engaged before him, and that the rules of court allow but two to argue cases, will not deprive the third counsel of his fee, unless the party shews he has neglected his duty.

This was an action brought by the plaintiff an attorney, before a magistrate, in Lexington district, for the sum of \$20, for a counsel fee. It appeared that the plaintiff was employed by the defendant in a case brought against him, by one Allen Body. The defendant frequently called on the plaintiff and consulted with him respecting the case, and procured subpoenas for him for his witnesses. At the trial of the case the plaintiff attended and took down the evidence, but did not argue the case, as two senior counsel, Mr. Stark, and Mr. Caldwell, were likewise engaged, and the rule of the court allows but two to argue in civil cases. It was proved, that from \$15, to \$50, would be a reasonable fee in such cases, according to the circumstances. The magistrate gave judgment for \$20, and an appeal was taken from his decree to the circuit court, Judge Richardson, presiding, who reversed the decree.

1st. Because he thought the plaintiff had no right to recover, being the *third* counsel, when the court allows but *two* to argue such cases; and that he should have informed the defendant of that fact.

2nd. Because the amount from \$15 to \$20, as proved, shewed the matter was beyond the magistrates jurisdiction, of \$20.

3rd. Because such claims should not be made by attorneys before such a tribunal, unless absolutely necessary, as it was degrading to the profession.

This motion was made to reverse his honor's decree.

NOTT, J.—The defendant in this case admitted that he employed plaintiff as counsel in his cause. It is not denied that he consulted him frequently, that the plaintiff issued subpoenas for him and performed every other duty of attorney and counsellor, except arguing the cause at the trial. But arguing the cause is by no means an indispensable part of a counsellor's duty. It is not unusual to submit a cause to the court without argument, and still more usual, where more than one are employed, to leave the argument to one only of the number. The manner of managing a cause, in that respect, is a confidence which must, necessarily, be reposed in the counsel. And I should regret very much that it should be generally understood that a lawyer is not intitled to his fee without making a speech, whether it be necessary to his clients cause or not. Neither do I think that the plaintiff was under any obligation to inform the defendant that more than two counsel would not be permitted to argue his cause. It does not appear that the defendant did not know it. Mr. Goldthwaite might have been more convenient for him to apply to for advice, subpoenas, &c. than any other person. Indeed it did not follow that because two other gentlemen were employed that the arguing of the cause might not have devolved on him. And it does not follow that he must lose his fee because it turned out otherwise in the event. The services of a lawyer are not to be estimated by the length of his speech, nor the benefit to the client by the number of them. The short advice to keep out of court altogether would frequently be of more value to the client than a speech three hours long.

The second ground upon which the decree of the magistrate has been reversed is that the demand was above his jurisdiction. But it will be observed that this was an action on a quantum meruit. The testimony was such as must be expected in such cases. The fee the witness said varied from fifteen to fifty dollars. The plaintiff charged twenty. He might have charged more. The magistrate might have

given a decree for less. That the plaintiff might have charged fifty instead of twenty dollars, did not deprive the magistrate of jurisdiction. Suppose the action had been for any article sold and delivered without any stipulated price would the magistrate have been ousted of jurisdiction if the witness had said it was worth twice as much as the plaintiff had charged? It does not follow, because the plaintiff may have charged more, that he may not charge and recover less.

The last ground is, because such claims should be carried before such a tribunal, only when absolutely necessary. I think in point of prudence the gentlemen of the bar should seldom appear as litigants in court, and particularly with their clients. But when they are driven to such necessity they must go to the tribunal which has jurisdiction of the matter. That does not appear to me to furnish any ground for reversing the decree of the magistrate.

I think the decision of the judge on the circuit must be reversed and the judgment of the magistrate affirmed.

James J. Caldwell for the motion,
Pickens Butler contra.

JOHN W. CLARK *ads.* **TURNER BYNUM.**

Under the acts of 1812, and 1817, magistrates and freeholders have no jurisdiction to put out a tenant who holds over under a *parol* lease.

By the act of 1817, power is only given to them, in those cases where the tenant shall make alterations or remove buildings on the premises, without the written consent of the landlord.

The preamble to an act may be used to explain an equivocal expression used in the enacting clause, but never to control its obvious meaning, nor to supply matter not embraced in its spirit and meaning.

This was a complaint, before a court of magistrates and freeholders, by the plaintiff against the defendant, that he held over the possession of a certain lot of land in Columbia, notwithstanding the determination of his lease, contrary

to the acts of Assembly of 1812 and 1817 in that case made and provided. The jury gave a verdict for the Plaintiff, and thereupon the magistrates made an order for restitution to the plaintiff. Upon this, defendant filed a suggestion for a prohibition before his honor Judge Gantt, at chambers, who refused the prohibition.

The defendant appealed on the ground:

That his honor Judge Gantt erred in refusing the prohibition; as magistrates and freeholders have no jurisdiction under the acts of 1812 and 1817 under parol leases, where the complaint is for holding over.

JOHNSON, J.—The lease under which the defendant held the premises was unwritten, and it is not pretended that the court of magistrates and freeholders are authorized by the act of 1812 (*page 39*) to restore the possession to the landlord in such a case. Their jurisdiction is limited by this act, in terms, to cases where the tenant holds under a written lease.

But it is contended their power is derived from the act of 1807. (*page 35.*)

It is true that the laws before passed were deficient “in providing a prompt mode of placing landlords in possession after the legal termination of leases or agreements parol or written, entered into between landlords and tenants; but in the enacting clauses the only power delegated to the court, and is found in the last clause is confined to those cases where the tenants shall make alterations or remove buildings erected on the premises, without the written consent of the landlord, and does not embrace the present case.

The preamble to an act may be used to explain an equivocal expression used in the enacting clause, but never to control its obvious meaning, nor to supply matter not embraced in its spirit and meaning. But in any view of this act, there can be no doubt as to this case. The preamble and enacting clause are in perfect unison. The former points out the evil and the latter provides a remedy for a particular case.

The case of *McDonald and Bonner vs. Elfe* (1 *Not and Mc Cord* 501,) is directly in point; and although the construction of the act of 1817 was not necessary to that case, it appears to have been well considered and the reasoning is very satisfactory.

Motion granted.

Gregg and Brickell, for the motion,

— contra.

BIRD vs. SMITH.

A copy of the memorial of a grant from the State of North Carolina, with a copy of the plat, taken from the Secretary of State's office, in North Carolina, regularly certified by the Secretary of State, and Governor of that state, by the act of 1803, is admissible evidence in this state of a grant and survey, if the party so offering it swear that it is out of his power to produce the original.

This was a question of evidence, the circumstances connected with which, will sufficiently appear in the opinion of the court.

JOHNSON, J.—The paper offered in evidence and rejected by the circuit court is a copy of the memorial of a grant by the state of North Carolina to Samuel Young, for 300 acres of land. It states, in a concise way, the number of the grant, the water course on which it was located, the corners, the courses and distances of the lines, and the day on which the grant issued. Annexed, thereto, is a copy of the plat remaining in the office of the Secretary of State of North Carolina; all of which is regularly certified by the Secretary of State, and Governor of the state of North Carolina. The rejection of this evidence constitutes the first ground of the present motion.

The act of 1803, (1 *Brevard* 319–320,) enacts, “that it shall be lawful at any time, hereafter, in every court of this

state, for any party, plaintiff or defendant, to produce in evidence a copy certified, by the Secretary of State and Surveyor general, of any grant and plat of land issued under the authority of this state, or certified copies of grants under the authority of the state of North Carolina;" to which a proviso is annexed, that the party so offering it, shall swear that it is out of his power to produce the original.

To enable us to come to a correct interpretation of this act, it will be necessary briefly to recur to the state of things which had preceded and then existed.

At the date of this grant, 1767, the boundary line between this state, and North Carolina was undefined, and she then claimed and exercised jurisdiction over a considerable portion of the northern and western part of this state, and granted a great proportion of the most valuable lands.

These grants were held to be valid, and suits, which involved the titles derived from them, were of frequent occurrence; and in many of them, as was to be expected, the parties were unable to produce the original, and it became necessary to supply this defect. On resorting to the office of the Secretary of State for North Carolina, it was found that it was not then the usage to record the grant, and all that the office furnished was the plat and a memorial of the grant corresponding with that offered in evidence in this case. In the early cases it was usual to examine the Secretary of State or other officer, having the custody of the record, to prove that such memorial and plat was all the record made of the grant, and they were uniformly admitted by the courts of justice, on proof of the loss of the original, as the next best evidence. In time, the fact, that the records furnished nothing else, became a matter of public notoriety. It was as familiar to the bench and to the bar, as the time and place of holding the courts, and proof of it was thought unnecessary; and this was the state of things existing at the time the act was passed.

The objection to the admissibility of this evidence is, that it is not a copy within the meaning of the act.

was irrelevant, as that circumstance could not divest him if he had acquired title under Henry M. Rutledge.

Under these circumstances the circuit court sustained a motion made on the part of the defendant for a nonsuit, and this was a motion to set aside the nonsuit, on the following grounds :

1st. Admitting that the parties were at the time of the trial tenants in common of the *locus in quo*, defendant not being so at the commencement of the action, he could not, by any subsequent act of his own, deprive plaintiffs of a remedy legal in its inception.

2nd. If plaintiffs were not entitled to recover to the extent of their claim against defendant, in the present form of action, they were still entitled to damages up to the time the defendant became tenant in common with them.

3rd. Because plaintiffs, at all events, were entitled to recover some damages ; as the defendant had not pleaded to the declaration.

The heirs of John Rutledge, including those who conveyed to the plaintiffs, had before conveyed the fee to H. M. Rutledge, by releasing the equity of redemption, and he conveyed to the defendant, which completes his chain of title. The neglect to record this release within the time prescribed by law, and the subsequent conveyance of Charles and William Rutledge to the plaintiffs constituted the foundation of their title.—Without entering into the question, whether this neglect did or did not operate as a *forfeiture, pro tanto*, it may be conceded that the deed from Charles and William Rutledge operated as effectually, as if they had not before joined in the release to Henry M. Rutledge. The whole number of the heirs at law of John Rutledge being eight, the plaintiffs would be entitled to two undivided eighths of the tract of three thousand acres, and the defendant to the remaining six eighths. The parties are then tenants in common, in that proportion; the defendants in

respect to the 1300 acres, and the plaintiff in reference to the whole tract.

The facts ~~that~~ they were such, and the legal conclusion, that one tenant in common cannot maintain an action of trespass to try titles against his co-tenant, without an actual ouster, has been frequently laid down by this court, and is not controverted in the grounds of the motion. It is assumed, however, that this state of things did not exist at the time the action was brought, and not until the conveyance, from Henry M. Rutledge, to defendant in 1822, which was subsequent to the commencement of the suit, and the right to recover for the trespass, preceding that time, is the basis of the first and second grounds of the motion.

In this assumption of facts, the agreement between Henry M. Rutledge and the defendant, who then stood in the same relation to the plaintiffs, that the defendants now do, has been overlooked. This agreement bears date in 1813, and long before the commencement of the action; and whether we regard its literal import or its spirit and meaning, it conferred on the defendant a right to enter and hold to the use of Henry M. Rutledge; and entering under his authority he cannot be regarded as a trespasser. It is not pretended that he committed any trespass anterior to that time.

The case had been standing on the issue docket for several terms. The state of the pleadings were not brought to the view of the circuit court, until after the trial was gone through, and it was put to the Jury as an issue between the parties, and it would be trifling with the court to permit the plaintiff now to take advantage of an irregularity to which he was at least accessory.

Motion refused.

Caleb Clarke for the motion.

Wm. F. De Saussure contra.

THE STATE vs. THORNTON HOLMAN.

Under the act of 1822, rendering it indictable for "*knowingly and wilfully packing or putting into any bags, bale or bales of cotton, any stone, wood, trash-cotton, cotton seed, or any matter or thing whatsoever &c.*" a person may be convicted for fraudulently packing, putting and pouring a large and undue quantity of *water* into bales of cotton with intent to cheat and defraud &c.

The expression "*any matter or thing*," is not restricted to the things, "*stone, wood, &c.*" specified in the preceding part of the clause.

The rule, that general terms in a criminal statute are restricted to the particular offences enumerated, does not apply, except in those cases where there is some repugnance or incompatibility between the specific and general expressions.

As under the act against trading with a slave, *the selling goods to a slave for cash*, was held indictable under the general words of the act "*or shall otherwise deal, trade or traffic.*"

Tried before Judge Gaillard, Laurens, Spring Term, 1825.

This was an indictment, under the act of December 1822, against fraudulently packing Cotton. The indictment charged that the defendant "*on &c. with force and arms, at &c. knowingly, wilfully and unlawfully did pack, put and pour, and cause to be packed, put and poured into two bales of cotton, a large and undue quantity of water to the purpose and intent to cheat and defraud one Alanson Rice, in the sale thereof, contrary to the form of the act.*" There was a second count for exhibiting and offering for sale the said two bales of cotton, knowing the same to be fraudulently packed

The defendant's counsel made a motion to quash the indictment by way of demurrer thereto, on the ground that the facts charged were not embraced in the act of the legislature on that subject, and did not constitute the offence intended to be punished by that act, therefore the indictment did not lie.

His Honor overruled the motion and decided that the offence, charged in the indictment did come within the act, and therefore the indictment did well lie.

The defendant not being ready for trial on the merits, the case was postponed.

The defendant's counsel now moved to reverse the decision of the presiding Judge on the same ground taken on the circuit.

JOHNSON, J.—The clause of the act of 1822, on which this prosecution is founded, is in the following words (*viz* :) “Be it enacted &c. that from and immediately after the first day of March next, if any person or persons whomsoever shall be convicted in any court of sessions of this State of knowingly and wilfully packing or putting into any bag, bale or bales of cotton, any stone, wood, trash-cotton, cotton seed, or any matter or thing whatsoever, or causing the same to be done, to the purpose or intent of cheating or defrauding any person or persons whomsoever &c. he shall for the first offence be sentenced to pay a fine &c.”

The arguments urged in support of the present motion are deduced from the rule, that general terms in a statute, are not permitted to control particular provisions; and it is contended that the terms “any matter or thing whatsoever,” must be construed in reference to the preceding specifications, and hence it is concluded, water not being included in those specifications, the defendant had not offended against the act. But it will be seen that this rule does not apply except in those cases where there is some repugnance or incompatibility between the specific and general expressions.

Without entering fully into the various and salutary rules which have been adopted in the construction of statutes it will suffice in the present case to refer to that laid down in the case of the *U. States vs. Fisher*, 2 *Cranch* 335–390, as superceding all others. It is, that where a law is plain and unambiguous, whether it be expressed in general or limited terms, the legislature should be intended to mean what they have plainly expressed, and consequently no room is left for construction. Let it then be asked what did the legislature mean by the use of those terms, and what do they plainly express? The

act itself gives the answer. If any one shall with an intention to commit a fraud, pack or put in "any bag, bale or bales of cotton, any stone, wood, trash-cotton, cotton-seed or other matter or thing whatsoever," he shall incur the penalty, &c. Here there is no incongruity between the specifications and the general expression, and it cannot be doubted that it was the intention of the legislature to punish frauds in packing cotton without regard to the character of the material used.

The case of the *State vs. Mugy* proceeded on this principle. In that case the court held that selling goods to a slave for cash, was a violation of the act against trading with slaves, under the general expression "shall otherwise deal, trade or traffic;" notwithstanding that mode of traffic is not enumerated in the many specifications contained in it.

Motion refused.

O'Neal & James, for the motion.

Earle, Sol. contra.

THE STATE vs. M'CROSKY.

It is necessary to constitute the crime of perjury that the false oath should have been taken in a judicial proceeding, or in some other public proceeding in like nature, and that the person, who received the oath, should have had competent authority to receive it.

In this State *arbitrators* even appointed by the court, have no authority to administer an oath; and a person cannot be indicted for taking a false oath before them.

Without an act of the Legislature, it seems, the courts cannot legally authorize any persons to take an oath before them.

Indictment for Perjury.

Tried before his Honor Judge Gaillard.

The perjury assigned was in an oath taken before arbitrators, appointed by rule of court, and administered by them. The offence is thus charged "The jurors &c. present, that, heretofore, to-wit at March Term 1824, in the court of common pleas, held at Pendleton court-house, in and for the dis-

trict of Pendleton, a certain cause, wherein John D. M'Croskey was plaintiff, and Enoch B. Benson, sheriff of Pendleton District aforesaid, was defendant, which before that time had been commenced &c. was then and there pending and to be tried, between the said parties. And thereupon, by consent of all parties, an order and rule of court was then and there made, amongst other things in substance and to the effect following, that is to say, that the said cause be referred to arbitration, and that Robert H. Briggs choose the arbitrators. And the said Robert H. Briggs prior to the arbitration hereinafter mentioned, chose and appointed as arbitrators, to hear and determine the cause aforesaid, the following twelve persons &c. (naming them.) And that afterwards to-wit on the seventh day of August 1824, the said arbitrators, so chosen as aforesaid, met and took upon themselves the burthen of the said arbitration, to-wit at &c. And that upon the said arbitration certain questions then and there arose, and it became and was material &c. And that Margaret M'Croskey then and there appeared in her proper person before the said arbitrators, they then and there having competent authority to administer an oath in that behalf, and was then and there duly sworn before them &c. and being so sworn was then and there examined and interrogated upon her oath aforesaid, by and before the said arbitrators, touching the matters in dispute and the questions in difference as aforesaid." The indictment proceed to charge, that the said Margaret M'Croskey "upon her examination before the arbitrators aforesaid, the said arbitrators then and there having competent authority to administer to her the oath in that behalf, did wilfully, falsely and corruptly swear &c." and sets out the oath, assigns the perjury, and concludes in the usual form.

The defendants counsel demurred to the indictment on two grounds.

1st. That arbitrators have not such a judicial authority as the right to administer an oath.

2nd. That no other person having competent authority is charged in the indictment to have administered the oath.

His Honour sustained the demurrer, and decided that the indictment was insufficient.

The solicitor now moved the court of Appeals to reverse the decision of the presiding judge.

JOHNSON J.—The grounds of this motion accords to the prosecution the existence of all the facts necessary to the consummation of the crime of perjury, except the competency of the arbitrators, as such, to administer the oath to the defendant.

It is of the very essence of the crime that the false oath should have been taken in a judicial proceeding, or some other proceeding in like nature, and that the *person by whom it is administered* should have competent authority to receive it. (5 *Jacob. L. D.* 135. *Tit. Perjury. 2. Chitty. Crim. Law* 304. *Tit. Perjury.*)

In general, any judicial tribunal, or any person instructed with the administration of justice, are competent to administer oaths in relation to matters within their cognizance. Such for instance are the superior and inferior courts of law and equity, courts of limited jurisdiction, magistrates &c. (*Haw. P. C. Book 1. ch. 69. p. 3.*) And it has been held to extend to commissioners appointed by the king to enquire of forfeited estates, whereby they are liable to be seized by the exchequer process. (*Noy.* 100.)

The conclusion to be drawn from these definitions, results I think, clearly in the deduction, that to entitle any one to administer an oath he must be clothed with a species of judicial power. In theory all judicial power is supposed to be lodged in the supreme authority of the State, and so much of it as may be necessary to the well being of the community is delegated to the different tribunals and functionaries. Thus, in England, the king is said to be the fountain of justice, and that through his courts he dispenses it to the subject.

And it is one of the peculiar properties of this power that he, to whom it is granted, cannot delegate it to another.—It follows, therefore, that judicial power cannot exist, unless it is derived from the supreme authority of the State.

In applying these principles to the case under consideration we are necessarily led to enquire from what source the powers of arbitrators are derived, and thence to conclude, whether they are judicial or not? They are, generally, when a case is referred by rule of court, nominated by the parties themselves, and in this particular case by a third person, with their consent, and, so far, it would seem, must derive their authority from the joint act of the parties and the sanction of the court and, neither, as has been before shown, could invest them with judicial authority. There is no act of the legislature authorizing this mode of proceeding or recognizing the existence of such a tribunal, and in this State it owes its origin and countenance to the usages and practice of the courts.

But it is contended, in behalf of the motion, that notwithstanding the legislature has not by any express enactment, and that although neither the court nor the parties invest them with that character, yet they derive it from the nature of their office and from the usage and practice of the country.

In England, from whence our common law rules are derived, and which are imposed on us by the express enactment of the legislature, it was the practice of the courts to have the witnesses who were to be examined before arbitrators sworn in open court. (*Kyd on Awards* 95.) From whence it may be fairly deduced that the arbitrators had not the power to administer an oath; and although it will not be controverted that a long continued and inveterate usage would control and abrogate a rule established even by this authority, it may safely be denied that it does exist. My own experience is, and such is believed to be the usage, to

procure the attendance of a magistrate by whom the oath is administered. This argument must therefore fail.

The case of *Chapman vs. Gillet* (2 Conn. Rep. 40) and the case of *Lyman & Westmore*, referred to in that opinion, have been relied on. The first of these cases, it will be seen, involved, incidentally, the question, whether giving false evidence under an oath administered by a magistrate, before a church convened for the purpose of administering discipline amongst its members, constituted the crime of perjury, and chief justice *Swift* rests his opinion entirely on the ground of usage, both as to the judicial powers of that tribunal and the mode of administering the oath.

I have not been able to find the case of *Lyman vs. Westmore* otherwise reported than by a reference to it in the preceding case, and it would appear, that that case involved the precise question under consideration, and in which the dissenting judges in the case of *Chapman vs. Gillet*, (*Edmond and Goddard*,) admit that perjury may be assigned on a false oath taken before arbitrators. But they rest their assent exclusively on the ground, that the powers of the arbitrators are derived from the statutes of the State of Connecticut. Both those cases therefore are reconcilable to the principles laid down. In the one, usage has consecrated the church as a sort of judicial tribunal, together with the mode of administering the oath, and the other derives its sanction from the enactments of the legislature, the supreme authority of the State.

It is urged, however, that to deny the power of arbitrators to administer an oath would be destructive of that convenient and salutary tribunal in aid of the administration of justice and in adjusting the disputes of individuals. I think, however, that the remedy is furnished by the case of *Chapman vs. Gillet*; if, as it is supposed, the usage is to administer an oath through the agency of a magistrate, on which I should be induced to think that perjury might be assigned, for the same reasons that it may in a variety of in-

stances where the act is ancillary to the administration of justice; as in an affidavit to hold to bail, to produce a continuance or the like.

Motion refused.

Earle, Sol. for the motion.
contra.

LOWE, administrator, vs. RAMSAY L. MAYSON.

The affidavit of an Administrator, to hold a defendant to bail, stated "that notes were found" among his intestates papers, "by which it appeared that defendant was indebted &c. \$1700." The court held that it was unnecessary to set out how many notes, or their dates, or to give any further description of them.

In this case, a motion was made to discharge the order for bail, upon the alleged insufficiency of the plaintiffs affidavit, which was in the following words viz:

"Personally came Henry W. Lowe, surviving administrator of Archy Mayson, deceased, who swears that notes were found among the papers of the said Archy Mayson, by which it appears that Ramsay L. Mayson is indebted to the said Archy Mayson's estate, twenty-seven hundred dollars and eighty-eight cents, and so far as this deponent knows and believes, the said Ramsay L. Mayson has not paid to the said Archy Mayson, during his life time, the said sum of money, or any part thereof, and this deponent swears, that the said Ramsay L. Mayson, hath not paid the said sum, or any part thereof to this deponent as administrator.

Henry W. Lowe."

His Honor Judge Huger sustained the defendants motion, on the ground that the above affidavit was not sufficiently definite and certain, not having set forth the number of notes, which were sued on, with their *respective dates*.

This was a motion to the court of appeals to reverse his decision.

JOHNSON J.—There is no doubt about the existence and necessity of the rule which requires that an affidavit to hold the defendant to bail must show how the cause of action arose (See the decision of the court in the case of *Peck vs. Van Evur*, 1 *Nott & M'Cord* 580.) It is necessary, to enable the court to judge whether the action has any legal foundation, or exists only in the imagination of the plaintiff, and to protect the defendant from the consequences of perjury, as is illustrated by the case referred to.

The affidavit in this case sets out, in general terms, the manner in which the debt arose, as far as the plaintiff can be supposed to be conversant with it; and if we regard the reasons of the rule, the objects are as fully attained, as if the notes had been recited with the utmost minuteness. Neither the dates or the number of the notes would enable the court to judge of their legal efficacy. And if the plaintiff has committed a perjury, the offence can as well be assigned on this affidavit, as if it had contained them; so that the whole object of the rule has been attained.

Motion granted. (a)

M'Duffie & Terry, for the motion.

Butler & Thompson, contra.

(a) An affidavit, "in so much on a bond for performance of covenants," or "upon breach of articles," is too general. (*Tidd* 137.) In the case of *Humphries vs. Williams*, (2 *Marshall's Rep.* 231,) an affidavit that defendant was indebted to the plaintiff, "as the indorsee of a certain bill of exchange drawn by one T. W. at a certain day now past," without stating how the defendant, became liable, whether as acceptor, or indorser, was too general. So in *Balbi vs. Batley*, (1 *Marsh.* 424,) the court held that an affidavit, which stated that the defendant was indebted to the plaintiff on promissory notes of the defendant, without stating how the plaintiff became entitled to recover upon them, was defective. See *Bradshaw vs. Saddington*, 7 *East* 94. and *Ib.* 694, See the forms in *Tidd's Appendix*.

R.

MAVERICK vs. GIBBS.

To an action on a contract containing mutual covenants, the defendant to take advantage of any breaches on the part of the plaintiff, by way of discount, must specify the breaches particularly in his notice of discount.

This is a branch of the same case, between the same parties, reported at page 211. The action was upon a covenant, which may be seen by a reference to that page. The defendant set up, by way of discount, in general terms, a breach on the part of the plaintiff, of *all the covenants contained in the Indenture*. Many breaches could have been assigned; and the question was, whether the defendant was not bound, in his notice of discount, to state specifically what breaches he complained of, in order that the plaintiff might know how to meet the allegation by proper evidence.

JOHNSON J.—The legitimate object of all pleading is to compel the party acting in place on the record that state of facts, upon which he depends for the prosecution or defence of his suit, that his adversary may prepare to meet it; and notwithstanding usage has, in some measure, dispensed with all the technical formalities in notices of discount which are required in declarations and pleas, yet there is no reason, when we take the object in view, why, to a common intent, they should not contain the specific grounds of defence.

In a declaration for the breach of a contract, the plaintiff is required to assign the breach in the words of the contract, either negatively or affirmatively, according to the nature of the contract, or in words which are co-extensive with the import and effect of it, (1 *Chitty on Pleading* 325;) and if there be more than one covenant in the same indenture, for the same reason the breach should be assigned on as many as have been violated, and for which the plaintiff seeks a recovery.

The notice of discount in this case is general, and charges the plaintiff with a breach of all the covenants contained in the indenture, on which the action is brought, and per-

haps it would be difficult to conjecture a case which would more clearly illustrate the necessity of some specification as to the nature of the defence. By this contract the plaintiff agrees to let to the defendant, for a given term, a plantation and some negroes, stock &c. and it contains many recitals and stipulations, for the breach of any one of which the defendant would have been entitled to maintain an action, and consequently to defend himself in this. And the counsel have, I think, enumerated no less than sixty-eight different breaches that the defendant might have assigned on this covenant. Now, if the defendant had given notice that he would defend himself on the ground, that the plaintiff had no title in the premises, or that he had held him out of the possession, either would have been conclusive against his right to recover and he might have come prepared to repel it; but without some such specification, it was impossible that he could see on what side the blow was to be struck, and thus be enabled to ward it off. The court therefore concur in opinion with the presiding judge, that the admission of evidence under this notice, was calculated to surprise the plaintiff, and that it was therefore properly rejected.

It is contended, however, that under the plea of the general issue, the defendant was at liberty to go into evidence to prove a breach of any of the covenants on the part of the plaintiff, without notice of discount, and the cases of *Farrow vs. Mays* (1 *Nott & M' Cord* 312,) and *Shelton ads. Exors. Gray* (1 *M' Cord*, 470,) have been relied on, in support of this argument. But the rule to be deduced from those cases is clearly reconcileable with the case of *Bollinger vs. Thurston* (2 *Rep. Const. Court*, 449.) They are indeed nothing more than practical applications of the rule laid down by the court in the case last referred to, and result in the establishment of the rule, that under the general issue, in actions arising ex contractu, the defendant may give in evidence any matter which goes to show that the plaintiff never had any cause of action, as that it was void for want of consideration, or founded on an illegal consid-

sation and therefore void, or that the supposed consideration had entirely failed, and such like cases. But where the defence in any way admits that the plaintiff's cause of action did exist and seeks to avoid it either in part or in the whole, by matter *aliunde*, he must either plead it, or in cases of discount, give notice of it to the plaintiff. On this ground also the evidence, offered by defendant, was properly rejected.

Motion refused.

W. R. Davis, for the motion.

Harrison, contra.

Vestry and Wardens of St. Bartholomews vs. CANTY.

The statute of limitations will bar the vestry and wardens of a church, as well as any other persons.

This case was decided by the late Constitutional Court of Appeals, in November Term 1823, but was accidentally omitted that year by the Reporter. The Reporter thinks it proper to insert it here, that it may not be lost.

It was an action of Trover, for a negro, brought by the plaintiffs against the defendant, in which the question was made whether the church could be barred by the Statute of Limitations.

GANTT, J. delivered the opinion of the court.

This case was tried before me, November Term, 1819, for Kershaw District, and on the plea of the statute of limitations, a verdict was found for the defendant, correspondent with an opinion expressed by the court to the jury, on the law of the case.

The defendant has appealed, and rests his case on a supposed inaccuracy in the opinion given by the presiding judge (*viz.*) that the statute was as effectual to bar the Vestry and Wardens of a Parish, as any other description of persons. The court are of opinion that the charge

of the presiding judge was correct in law, and that the appellant can take nothing by his motion.

Johnson, Nott, Colcock and Huger, concurred.

PEAY vs. PICKET.

By the law of England, a copy of a deed, duly enrolled, is as good evidence as the original itself; and was the law of this state till the case of *Purvis vs. Robinson*, a decision much to be regretted; decided that the loss of the original must be proved, to admit a copy.

But to prove the loss, the court will only require the best evidence the nature of the case admits of; and the only way of proving the loss of any thing, is by shewing that it has been sought for, where it might have been expected to be found, or was usually kept; and that it could not be found. So the destruction of a paper may be presumed from circumstances; as the burning of a house, the loss of a vessel, or the ravages of war.

A copy of a deed executed in 1779, and recorded in the Register's office in Charleston, was admitted in evidence upon proof of diligent search having been made, where it was probable it should be, on the presumption of its having been destroyed during the revolutionary struggles.

This was an action of trespass to try title to 500 acres of land, originally granted to John Heard, on the 25th of August 1774. The plaintiff would have deduced to himself a title by deed thus : From the grantee to William Nesbit, in 1775; from Nesbit to John Dart, in 1779; from Dart to Rout in 1779; the last will and testament of Rout in 1802, to his executors, to sell ; and their title to the plaintiff, 25th February, 1815.

The only question made, was whether the deed from Nesbit to Dart was sufficiently proved ? The original was not produced. It was proved that diligent search had been made for it, without success, in the Register's office, and among the papers of Rout, from whom the plaintiff purchased. A certified copy of it from the Register's office, in Charleston, which was then the only recording office in the State, was offered in evidence ; and besides the certificate of the Register, it was proved, by a witness, present in court,

to be a correct copy of the record, with which he had compared it. The deed of which this was a copy, was dated 10th August, 1779.

This copy was objected to, on the ground that a copy deed was no evidence, and that neither the plaintiff, nor any one under whom he claimed, had ever been in possession of the land. That if a copy deed was admissible, yet, no copy probate was endorsed upon the copy in this case, and therefore it did not appear that it had been proved by the subscribing witness, before it was recorded; and further, that it purported to have been subscribed but by one witness.

It was contended by the counsel for the plaintiff, that after so great a lapse of time, the court would presume that all had been done which the law required, and that the officer would not have recorded the deed unless it had been proved. And that the evidence of diligent search, without success, and the possession by the plaintiff of all the title deeds from the grant down, together with the ravages of the war of the revolution, were circumstances sufficient to be left to the jury, and from whence to presume, that the deed had been executed from Nesbit to Dart. The presiding judge (Gantt J.) thought otherwise; and said that the act of 1731, (*Pub. Laws* 130,) admitting copy-deeds, was in abrogation of the common law, and that all acts which are so, must be construed strictly. That by the terms of the act of assembly, it appeared, that a copy is only admissible in evidence, when certain prerequisites have been complied with; particularly, that the deed shall have been proved in the usual way, before recorded: So that to entitle such copy to admissibility in evidence it must appear that the deed had been *proved and recorded*. That the paper adduced, as a copy, purported to be a deed of this land from Nesbit to Dart, but it furnished no evidence of the same having been proved in the "usual" or any other, way; it also purported to have been executed in the presence of one witness only; and that the presumption arising from the want of probate of the deed was a fact

from whence the conclusion was to be drawn, that it was never proved. He thought that the landed interest of the country would be secured by a tenure most precarious if the rule contended for were to prevail. He said if the positions laid down in *Selwyns Nisi Prius*, (725 and 726) were correct, and the interpretation given to the act of assembly for admitting copies of deeds in evidence be just, then the plaintiff did not entitle himself to a recovery in this action; because there was no evidence on which a presumption could rest, that a deed had been made from Nesbit to Dart; as neither the grantee, nor any claiming under him, had ever been in possession of the land, and that no evidence was offered to show that Dart had ever been in possession of the land granted to Heard and conveyed to Nesbit. These transactions were a far off from the land, and he could not think that the mere circumstance of the plaintiff's having possession of title deeds, without ever having had possession under them, was entitled to any consideration in law. That the case in *2 Bays Reports* 133. (*Frosts ads. Brown*,) where a deed was missing from Waring the son in law of the Landgrave, was fraught with many strong circumstances from whence a presumption might be deduced in favour of his having made a deed. That judge Waities who delivered the opinion seemed to think that the presumption was badly founded in that case, but in as much as two juries had found in favour of the plaintiff, on grounds which had been conceived proper for their consideration, a third new trial was refused.

The jury found a verdict for the defendant.

The plaintiff appealed and moved for a new trial.

1st. Because his Honor the presiding judge refused to admit the copy deed from Nesbit to Dart in evidence.

2nd. Because His Honor charged the jury, that there was not one circumstance or fact tending to authorize the presumption of a deed from Nesbit to Dart, but plaintiffs mere corporal possession of the title deeds, and that there was no legal evidence, that a title from Nesbitt to Dart had

ever existed. That the plaintiff had no more title to the land than he had; and because his Honor did not leave the case to the jury upon the question, whether a deed might be presumed from the facts, and did not state to them that it was a question for them exclusively to decide.

3rd. Because the jury ought to have presumed a deed from Nesbit to Dart.

W. F. DeSaussure, for the motion,—cited the case of *Anderson vs. Gilbert*, (1 Bay 368,) where a copy of a deed of conveyance, recorded, and certified from the Registers office in Charleston, as in this case, was held admissible, and was admitted without any proof of loss. He also cited *Dingle vs. Bowman* (1 M'Cord Rep. 176.) *Turnipseed vs. Hawkins*, (Do. 272.)

In *Reed vs. Eifert*, (1 N. & M.C. 274,) a deed was admitted as ancient, on proof that the party claiming under it had surveyed it. He also cited *Duncan vs. Beard*, 2 Nott & M'Cord, 400, & *Jackson vs. Todd*, 3 John. Rep. 303. *Arthur vs. Arthur*, 2 Nott & M'Cord 96.

Clarke, on the same side,—said copies of public records are always admissible. (*Lynch vs. Clark*, 3 Salk. 153. A deed of bargain and sale recorded is a public record. (2 Black. 238.) He also cited 2 Bacon, 646. *Tit. Ev. A.*

Colcock J.—From the earliest enactments of the British parliament on the subject, to the present day, a period of about 280 years, it has been the established law of that country, that a copy of a deed, duly enrolled, is as good evidence as the original itself; (*Phill. 351*) and I think I do not say too much, when I assert, it was generally considered to be the law of this land from the first enactment on the same subject here, in 1731, (*P. L. 123*,) to the decision of *Purvis & Robinson*, (1 Bay 485,) a decision much to be regretted, in which it was determined that the loss of the original must be proved to admit the introduction of the copy. But in conformity with that decision, which is considered as obligatory on us, I think the plaintiff entitled to a new trial. All the circumstances

of the case and the evidence offered, together with the historical facts of the country, afford sufficient proof of the loss to have authorized the introduction of the office copy; for we are not warranted by any thing in the decision itself of *Purvis & Robinson*, to suppose that any other evidence of loss was intended than such as it required by the rules of the common law. When evidence is offered on any subject, in order to determine, whether it be competent and sufficient, we must look to the nature of the fact to be proved. If it be one which is susceptible of positive proof, such will of course be required; for the first and fundamental rule of evidence is, that the best which the nature of the thing affords shall be given. Now, generally speaking, it is impossible to prove the loss of a thing, in any other way than by shewing that it has been sought for where it might be expected to be found, or was usually kept and that it could not be found. In some few cases, which may be rather considered as exceptions to a general rule, the destruction of the paper may be proved, or such circumstances as will induce a belief that it has been destroyed; as the burning of a house, the loss of a vessel, or the ravages of war. When we consider the infinite variety of ways in which papers are lost, and add to this, that for the most part the loss takes place without the knowledge of the owner, no other than circumstantial evidence can be generally expected.

Now, what are the circumstances and the proof before us in this case? The plaintiff makes out a long chain of title, consisting of seven links, tracing a title back to a grant made in 1774. One of the links in his chain is broken. A deed from Nesbit to Dart, executed in 1779 is lost. To supply the place of which, he offers a copy taken from the Registers office in Charleston. He proves that he has made diligent search for it every where. But from the facts of the case, connected with the history of the times, in which this deed was made and recorded, there arises a presumption, stronger than is afforded in one case in a thousand, that the deed was lost or destroyed by the enemies of the country. In which

case,² no further evidence is necessary to be produced. For when it is proved that a deed is destroyed, it follows that there is no occasion to prove that it has been sought for. (*Phill.* 347)

This deed was executed in August 1779. The city of Charleston fell into the hands of the British on the sixth of May following. There was at that time but one recording office in the state, and consequently a great deal of business to be done: so that one would not have had a right to expect that his deed would be very expeditiously recorded. The deed was recorded, but on what particular day does not now appear. Under those circumstances there is a strong probability that the original was yet in the Registers office at the time the town fell, and might have been lost or destroyed in the removal of the papers for the purpose of safe keeping. But if it were not lost in this particular manner, the confusion of the times would furnish innumerable occasions on which it might have been lost; and the great length of time which has elapsed puts it out of the power of the party to furnish any better evidence of the fact. In the case of *Rochell* and *Holmes*, (2 Bay 488,) a copy of a grant was admitted, under circumstances not as conclusive as those offered on the present occasion, as to the length of time and the existence of war.

It is the opinion of the court that the copy deed should have been admitted, and therefore a new trial is granted. (a)

Wm. F. DeSaussure for the motion.

Pearson contra.

(a) The Reporter has paid considerable attention to the act of 1731, and he is perfectly assured of the correctness and propriety of the objections of his honor to the decision in the case of *Purvis* vs. *Robinson*. There can be little doubt that the decision in *Purvis* vs. *Robinson*, was made, upon an inspection of the statute, as published by Judge *Grimké*, in his *Public Laws* p. 133. Now, the statute, as published there, is so mutilated and defective, as entirely to destroy its principal feature. The Reporter says this with great respect, to the memory of that learned judge, whose legal publications have certainly been as useful, as any yet made, in this state. The Re-

porter was led into an investigation of the original publication of the statute in *Trott's Laws of South-Carolina*, 541, by these facts. The opinion of the court, in *Purvis and Robinson*, as expressed by Judge *Waties*, in 1 Bay 485, is founded upon a construction, of the different clauses of the statute, *pari materia*. The 30th clause is connected with the 7th, and controlled in the generality of its expression, by the provisions in the 7th clause. In making this construction, reference is made to *Grimke's Pub. Laws*, 133. No reference whatever is made to *Trott's Laws*. The writer takes it for granted then, that no reference was made to the statute in any other form than as published in *Grimke's*. The case of *Purvis and Robinson*, as his honor has observed, overruled what was considered the law from the very enactment of the statute in 1731, up to the decision of *Purvis and Robinson*, 1795. But, besides overturning what was the generally received opinion of the law, it overruled the case of *Anderson vs. Gilbert*, made in 1794, (1 Bay 368.) Upon a reference to these cases, these facts will appear. The former opinions of the profession, and the decision in *Anderson vs. Gilbert*, were founded upon the *whole* statute, as published by *Trott*. In that case express reference was made to *Trott*; and *Grimke's P. L.* was at that time but a new publication, which had not yet moulded the opinions of the lawyers. It was unfortunate in the case of *Purvis vs. Robinson*, that a construction, *ex pari materia*, of the statute, should have been made upon a publication of the act which did not contain *six whole* clauses, out of *thirty one*. For, of the very 7th clause, which his honor Judge *Waties* connected with the 30th, and wherewith he controlled the generality of the expression of the 30th clause, not one half of it is published by Judge *Grimke's*. Both the beginning of the clause, and the end, are omitted!! Nothing else, could have mislead the acute and vigorous intellect of that learned and accomplished judge, in the decision of *Purvis vs. Robinson*.

Let us, now, with great deference to the opinions of the judges, in *Purvis vs. Robinson*, examine the *whole* statute, as published by *Trott*. To understand so much of the statute, as is necessary for the better comprehension of these observations, without a reference to *Trott*, it should be observed, that the province of Carolina was the property of the Lords Proprietors, until the 1st of June, 1729, when George II. purchased it of the proprietors, except Lord Carteret's share. There being eight proprietors, he paid £17,500 for seven eights. Lord Carteret's share, I believe, was afterwards located in North Carolina. All these facts will appear by the act of parliament, 2 Geo. II. c. 34. (*Trott's Laws* 483.) By this act, it is recited, that, whereas the lords proprietors, "had made divers *grants and conveyances*" &c. "of divers parcels of land, situate within the said pro-

vince," "and under certain *Quit Rents*," &c. in consideration of their relinquishing to his majesty all arrears of such *Quit Rents*, his majesty paid them £5000, and they set over and conveyed to the King all their claim and right to such *Quit Rents*. Three years after this statute, in the 5th year of George II. the general assembly of South Carolina passed an act, having for its principal object, "*The securing of his majesty's Quit Rents*," recognizing the contract with the proprietors, and in pursuance of the statute, 2 Geo. II. c. 34. This statute occupies nineteen pages folio. It is headed, throughout, "*Quit Rents*." The King, through his governor, Robert Johnson, by it, relinquishes all claim for *Quit Rents in arrear, upon condition* that the assembly "provide that all possessors of land, in his majesty's province of South Carolina, do forthwith register their respective *grants*," and "every person possessing land by *grant* from the late lord proprietors," in the Auditor General's office, "*for the future pay* unto his majesty, &c. of the annual *Quit Rent*, reserved upon such *grants*. The act then provides,—"*to the End* therefore that your majesty's *Quit Rents* may be better ascertained, and the future payment thereof better regulated," &c. "*Be it therefore enacted, &c. viz:* That all persons shall register their *patents or grants*, or memorials thereof in the Auditors office, *to be created*. These are the provisions of the *first clause*.

The *second clause*, provides, that all persons claiming lands, in the Province, should record their "*patent grants*," or "*last mesne conveyance or deed, or will*, under which the party *immediately claims*," in the Auditor's office, *within eighteen months*, "*which entries or registers, of all and every such grants, &c.*" shall be sufficient evidence *to charge the parties* with the rents respectively."

The *third clause*, requires Guardians, Trustees &c. to register the grant or deed under which they *immediately claim*, in like manner.

The *fourth clause*, fixes the Auditors office in Charleston.

By the *fifth clause*, *Rents* are to be paid in proclamation money.

By the *sixth clause*, if original *grants* made by the lords proprietors be lost, the *Quit Rents*, are to be rated at 12d per 100 acres.

The *seventh clause*, that which has caused so much dispute, is very long, and provides, that if lands are not registered *within eighteen months*, after the erection of the Auditor General's office, the same shall be considered as *vacant land*, and any person may take up the same: *Saving*, however, to minors, feme coverts, &c. and "*Provided* always, nevertheless, that if any person or persons, who are possessed of any lands &c. in this Province, have by fire or other accident, lost their *original grant, or deed* [or, as in the 2nd clause,

"or last mesne conveyance,'] or will, under which they immediately claim," if they make oath of their loss, then, in such case, if they can procure "an attested copy of such grant, deed or will, or probat of the same," from the Secretary's office, or Registers office, of the Province, (for up to this time no persons were bound to record their deeds) and produce the same unto his majesty's Auditor or his Deputy, he shall register the same, "as before directed for original grants, deeds, or wills;" and the proviso then declares, that, certificate of the same, or the attested copy, and the record of the same in the Secretary's and Register's office, together with possession, "shall be deemed good evidence of title at law, until better evidence of title appear." And a second proviso or saving, in the same clause, enacts, that if any person has lost his grant, deed, or will, as aforesaid, and no record of it can be procured, then upon his taking oath of such loss, and proving his possession, he may get out a new grant, paying a Quit Rent of 12d. per 100 acres. These are all the provisions of this clause; and they have evidently no connexion with any general rule of evidence. They are particular provisions for particular cases, which must, from the provision of the clause, have occurred within the eighteen months allowed by the act.

All the other clauses, 8th. 9th. 10th. 11th. 12th. 13th. 14th. 15th. 16th. 17th. relate entirely to Quit Rents. The 18th clause provides a Registry office for recording deeds, conveyances and mortgages. The 19th clause clears up doubts as to certain grants, abolishes livery of seizen, &c. The 20th clause relates again to the Rents. The 21st. to fees of office. The 22d. 23d. 24th. 25th. 26th. 27th. 28th. clauses, are on subjects relating to the titles of the province or to the rents.

The 29th clause, is a general law, as to feme coverts conveying their inheritance. The 30th. and 31st. are provisions of general law. The 30th. is the clause under which the case in the text arose. It is in the following words:

"And be it further enacted by the authority aforesaid, That the records of all grants in the office of the Auditor General or his deputy, and the records of ALL grants and deeds duly proved before a justice of the peace, according to the usual method, and recorded or to be recorded in the Register's office of this province, and also, the attested copies thereof, shall be deemed to be as good evidence in the law, and of the same force and effect as the original would have been if produced, in all courts of law and equity."

Now this clause, speaks of ALL grants and deeds, and provides a general rule of evidence. The 7th clause only provided, that in case a man had lost his title under which he immediately claimed, he might

within *eighteen months* from the time of passing the act get a copy, and register it; which, being so registered, should be evidence, of what he had already proved to be lost. The 30th clause requires *all deeds to be proved before they are recorded*, and if they are so *proved* and recorded, declares attested copies of them or the records of them, shall be as good evidence as the originals. *This law* was not confined to eighteen months. How can these two clauses then be connected together? They have no more connexion with each other, than any other two clauses in the act; except that both have the words, "*grant and deed*" in them. The 30th, clause is almost as distinct from the other clauses, as if it were a separate act. General laws are often passed in this way. The four last clauses, indeed, are each general laws. The 28th, abolishes livery of seisin; the 29th, provides a method for feme coverts' conveying their estates; the 30th, provides a general rule of evidence; and the last, provides, that if upon survey it turns out that a grantee has more land, than his grant calls for, he still shall be entitled to it. A law under which the country has acted ever since; and perhaps has forgotten, from whence the rule came.

The sole object of the 7th clause, was to let the king or his agents know whom to look to, for the rents; and the *last* conveyance would always tell.

To prove the loss of a deed! Can any thing be more difficult? It is said prove diligent search has been made. This is done by the party himself. How will he prove it? He gets a friend to search for him! Where will he look? Into the public offices? That he may do, But suppose the plaintiff's ancestor has lost the deed, and the plaintiff himself has the papers of his ancestor? where must he go to look? Into the plaintiff's house? And if he please, he may conceal the original (admitting it to be a forgery) and upon search of all the old papers, it is not found. Must search be made in the house of every relation or intimate friend? Or suppose the plaintiff loses the deed himself, who will prove it? What degree of search is enough? Where to begin or where to end?—The law evidently intended to avoid these difficulties, and therefore required the deed to be *proved* before it was recorded, and after that, an attested copy is made to be as good evidence as the original.

In *Tennessee* the affidavit of the parties counsel stating that it was out of the power of the principal to produce an original grant or deed, was held sufficient proof of the loss to let in the registered copy. (*Smith vs. Martin*, 2 *Overton's Rep.* 208.) In *New-York*, *Pennsylvania*, and *North Carolina*, the testimony of the plaintiff is admissible as to the loss of an instrument. (1 *Starkie* 349. note (1.) See as to proof of loss, generally. (*Id.* 350.)

It appears also to the Reporter that copies exemplified under the hand and seal of the Register is sufficient, without the proof by a witness of the correctness of the copy. For "where the law intrusts a particular officer with the making of copies, it also gives credit to them in evidence, without further proof." See 1 *Starkie on Evi.* 154, 365, 368, *note* (1.) where all the cases are collected. R.

COURT OF APPEALS,
OF THE
STATE OF SOUTH CAROLINA,

November Term, 1825—Charleston.

JUDGES PRESENT,

Nott, Colcock, Johnson.

**J. D. ANSLEY, a British subject, vs. GEO. TIMMONS, Fine
Collector of the 17th Regiment S. C. Militia.**

The act of 1794, requiring aliens to do militia and patrol duty is neither against the constitution of the United States, nor against the Laws of Nations. The constitution of the United States, has not given to Congress the absolute and *exclusive* control over the militia of the States.

It seems, the power given to Congress, by the 8th section of the *first article* of the constitution, is of a limited nature and confined to the objects specified in the clauses, and in all other respects and for all other purposes, the militia are subject to the control and government of their respective states.

This was an application to judge Bay for a prohibition to restrain the fine collector, of the 17th regiment of militia, from collecting a fine, imposed by a court martial on J. D. Ansley, a British subject, following the occupation of a merchant, for non-performance of ordinary militia duty. The 23rd clause of the militia act, under which the relator was required to do militia duty, is as follows : "Whereas a doubt has arisen, whether aliens and other transient persons, who

have resided or may reside in this State, for a considerable length of time, and enjoy the benefit and advantage resulting from the organization of the militia of this State, are liable to do militia duty, and whereas it is but just and reasonable, that those whose property is secured by the care and watchfulness of the community in which they reside should contribute to its protection; Be it enacted by the authority aforesaid, that all free white aliens, or transient persons, above the age of 18, and under the age of 45, years, who have resided, or hereafter, shall or may reside in this State for the term of six months, shall, immediately thereafter, be and are hereby declared to be subject and liable to do and perform all patrol and militia duty, which shall or may be required by the commanding office of the Beat or District in which such alien or transient person shall reside, and be subject and liable to all pains and penalties inflicted by the act, any law, usage or custom to the contrary thereof notwithstanding, *Provided*, always, that nothing contained in this act shall be construed to extend to or affect, in any wise or manner, the natural born citizen of any State or Potentate, who shall be actually engaged in war with the United States, or to compel such alien or transient person to serve on patrol or militia duty, out of the particular District of the regiment to which he may be attached, nor to natural born, bona fide, French citizens, (not being citizens of the United States,) who are by treaty exempt from all personal services." (1 *Faust* 321.)

The prohibition was refused.

A motion was now made to set aside the decision, of judge Bay, and for the prohibition to issue, on the grounds.

1st. Because the court martial exceeded its jurisdiction; in as much as the law of this State, on so much of it, as requires aliens to do militia duty, and under which they acted, contravenes the laws of the United States, made in conformity with the 8th section of the first article of the Constitution of the United States, which gives power to Congress

to organize and discipline the militia, and is therefore void *ab initio*.

2nd. Because the courts of this State are bound by the laws of Nations ; and by the laws of nations, an alien, owing allegiance to a foreign prince, and residing under the government of the United States, cannot be made to bear arms.

3rd. Because the decision of judge Bay, was contrary to treaties existing between Great Britain and the United States, and in other respects contrary to the Constitution, and the laws of nations.

Colcock J.—Two questions are presented for our determination :

1st. Is the clause of the law which requires aliens to perform militia duty within their regiments unconstitutional?

3nd. Is it a violation of national law?

In deciding a question of such vital importance to the interest of my fellow citizens, I feel most sensibly the responsibility of my situation ; and the magnitude of the duty is not diminished by any confidence in my own powers.

I shall not attempt to follow the counsel through their very able and elaborate argument. Many of their fundamental positions will be readily acceded. It is not a question at this day, that all power emanates from the people, and that the Federal Constitution was formed by them. But this does not enable us to determine the quantum of power which they intended to delegate to it. I take it to be equally clear, that having in each State established independent sovereignties, before the formation of this government, that they did not intend to take from the sovereign power of these States more than was essentially necessary for the establishment of the federal government, and that it is not the duty of the judiciary of the States to attempt to enlarge or diminish the power which is given. When we advert to the situation of the States at the formation of the government and to the well known jealousy of those who were opposed to a consolidated government, it is not to be supposed that every grant of

power to the general government is necessarily exclusive; for that would most effectually destroy every thing like sovereignty in the States. The reasonable and just construction of the Constitution leads to an opposite conclusion; for it is said by those able and distinguished expositors of the constitution, whose writings are contained in the *Federalist*, that no power is to be considered as exclusive, except when it is so in terms, or where there is a direct repugnancy or incompatibility in the exercise of a similar power by the States. The power in the case before us is given in these words, "to provide for calling forth the militia to execute the laws of the Union, suppress insurrection, and repel invasion;" to re-organize &c. Now here are no exclusive words, nor does the constitution prohibit the States from the exercise of a similar power when the same shall be necessary for State purposes. It only remains then to ascertain if there be any direct repugnancy in the exercise of the power in the State, and I would ask, whether a State may not require the aid of its militia to suppress insurrection and rebellion, or to repel invasion? To assert that the people of any State had surrendered to the general government, the absolute and exclusive control over the militia, would excite great surprise. But to say, that the States, who are so peculiarly and unfortunately situated as we are, in relation to a large majority of our inhabitants, should have done so, is calculated to excite something more than surprise. Can it be thought that a government, like that of this State, can be supported without the aid of militia? How are the laws to be enforced? The States are prohibited from raising armies or supporting a navy. How should we suppress a rebellion? Apply to the President to make a draft of the militia? It is true that the 4th section of the 4th article of the constitution secures to the States the aid of the general government when called for; but they may surely make use of their own means in the first instance. It has been contended that the restriction on the power granted, "that of appointing officers and training

the militia," was intended as an expression of the only power which was left to the States. But the fallacy of such reasoning is easily detected. It is contrary to reason and common sense, that the restriction of a power granted should be used to extend the power; on the contrary, this restriction proves, most incontrovertibly, that the power was intended to be divided and not actually given up; and in my opinion it speaks volumes on the subject. To whom is the agent responsible? To his principal. Reserving to the States the command of the officers, is reserving the use of the soldiers, except when called out by the general government, and in the field or at the place of rendezvous. The militia officers are under the authority of the State and may therefore be commanded to enrol, (to answer the question of the counsel for the appellant,) even boys or old men for State purposes. But in the language of the distinguished judge, *Story*. "It is almost too plain for argument, that the power here given to congress over the militia is of a limited nature, and confined to the objects specified in the clauses; and that in all other respects and for all other purposes, the militia are subject to the control and government of the State authorities," (*Houston vs. Moore*, 5th *Wheaton's Reports*, 50.) But it is said that in cases of concurrent authority where the laws of the State and the union are in direct and manifest collision on the same subject, those of the union, being the supreme law of the land, are of paramount authority, and that congress having declared that all free white males within the ages of 18 and 45 shall constitute the militia, no others can be admitted. The principle is admitted, though the deduction and its application is denied. Having established the position of a concurrent authority, it is not difficult to shew that there is no collision in the exercise which has been made of it by the two governments. Our patrol law, on which the safety of the State so much depends, as well as some other of our laws of a similar character, applicable to our peculiar situation, are in some measure incorporated with the militia laws.

The captains of the beat companies are required to prick off so many from the muster roll, once a month, to perform patrol duty. For the purpose of discharging this municipal or State duty, all within his beat are to be enrolled. So in the act to suppress insurrection, the magistrates issue their warrants to the militia officers. It is not pretended that the alien is to be forced into the service of the United States; on the contrary he is only required to do duty within his regiment. To say that he must stand a draft when one is ordered by the general government, is begging the question. He is not among those whose services the United States have thought fit to require, when they shall be called on to enforce their laws, suppress insurrection, or repel invasion.

It was further urged, that the law was unconstitutional, because all power over foreigners was committed to the general government. But I am not aware of any exclusive power which is given to the general government over foreigners in their individual capacity, except that of making them citizens. It is admitted that the States in the exercise of the sovereign power which they possess are bound to observe the laws of nations and to regard the rights of foreigners, so far as they are defined and protected by those laws: I will therefore proceed to enquire whether the act in any respect contravenes the laws of nations.

Two positions are taken by the counsel for the appellant on this branch of the case.

1st. That it is the right of a foreigner to enter any state he may choose to visit for lawful or innocent purposes.

2nd. That no state has a right to require the personal services of a foreigner, except on sudden emergencies.

Reference has been made to *Grotius* and *Vattel*, in support of these positions. It is not saying too much, perhaps, to say that it is on many points difficult to determine what is the law of nations. When we recollect what is the foundation of this law, it is not surprising that it should be so, unless it be reduced to something like positive law by in-

Interchange of treaties ; and to effect such an object with even a large portion of the nations of the earth, both experience and history has shewn it to be impossible. The first author referred to, *Grotius*, " directs us, in searching for the law of nations, to have recourse to the same means, that are made use of in searching for written civil law, to usage or custom, to conjectures, and to the judgment and testimony of skilful persons." Now (says *Rutherford*, in his comment on this part of *Grotius*, (*2 Institutes* 470.) " The usage in which unwritten civil laws appear, consists in immemorial and uninterrupted practice. But if we look into the practice of nations, as it is related in history, it does not appear, in any instance to have been constant and uniform; that is, no usage appears, from whence we can collect what the positive law of nations is." *Grotius* was aware of this: for when this help fails, he directs us to have recourse to conjectures. A most uncertain guide truly. But if the practice of nations has been variable and contradictory, all conjectures will be nothing to the purpose ; and it is as little to the purpose to refer us to the judgment and testimony of skilful persons. " Where do they find it ? Their skill cannot discover any usage of nations, where the practice, as history relates it, is variable and contradictory. Their judgment will afford us as little aid; for there is no room for its exercise; and their testimony will prove nothing, where the law is an unwritten one, and consequently they can have no record of it before them." But if the law of nations, instead of being purely positive, is only the law of nature, applied in consequence of the common consent of mankind, to the collective bodies of civil societies, as to moral agents, and to the several members of such societies, as to parts of those bodies, the dictates of this law may be found by the same means that we make use of in searching for the dictates of the general law of nature ; and pursuing this guide, it will not be difficult to shew that every nation has such an absolute, exclusive, right of territory, as well authorizes a refusal to any individual to enter or remain with-

out the consent of the supreme power, or under such conditions or restrictions as such power may think fit to impose. In fact, I think it may be shewn, that *Grotius* himself is obliged to yield this point, and that he does yield it. In the first volume he contends for the right of foreigners to enter and pass through the territory of any nation, and even so far as to say it may be considered a just cause of war, if they are refused; but when the inconvenience and even danger resulting from such a doctrine press themselves on his mind, he replies, "your fears cannot abridge my rights." In the conclusion, however, he says, if there be fear, hostages may be required, or they may be compelled to go through in small parties." Thus yielding the whole ground; for if they can impose terms, they are to judge what they may be, and thus the exclusive right is acknowledged. The authority of *Vattel* is also relied on, but on examination it will be found that, that part of the work referred to, the 8th chap. of the 2nd book, is treating only of those who pass through or sojourn in a country, as contradistinguished from resident foreigners. The chapter commences by saying, "we have already treated of the inhabitants or persons who reside in the country where they are not citizens." Of transient foreigners he does say they are not subject to militia duty, and that the State cannot control their persons; that is, detain them when they wish to depart; which may be granted without impugning the act which requires resident foreigners to do duty: The whole chapter would shew, however, that the sovereign power has a right to impose any condition he pleases on a foreigner who enters the territory. In section 135. p. 172. he says, "since the lord of the territory may whenever he thinks proper forbid its being entered, he has no doubt a power to annex what condition he pleases to the permission to enter." He goes on after thus establishing the right, to recommend, of course, that it be exercised with humanity. In page 102, Book, 1st section 213, he says, "the inhabitants who are distinguished from citizens, are so-

foreigners who are permitted to settle and stay in the country. Bound to the society by their residence, they are subject to the laws of the State, while they reside in it; and they are obliged to defend it, because it grants them protection, though they do not participate in all the rights of citizens." *Rutherford*, in his lectures on *Grotius*, after a most elaborate view of this doctrine, says, "in consequence of this exclusive right of property which a nation has in its own territories, the law of nations is not the only measure of what is right or wrong in the intercourse of nations with one another. This right of territory extends the authority of the civil law to all questions which relate to the use or private ownership of such moveable goods as are within the territory of the nation, and of such immoveable goods as are confessedly a part of the territory, whether its own members are concerned in these questions, or the collective bodies, or the individual members of other nations: Thus every State has authority to determine by positive laws upon what occasions and for what purposes, and in what numbers, foreigners shall be allowed to come within its territories; to exclude them from trading there at all; or to regulate their trade; to leave them under their natural incapacity of inheriting immoveable goods, or to prescribe the conditions upon which they may inherit." It is true that *Rutherford*, (as all other writers on the subject do) recommends that this power be humanely exercised. Every nation, as well as individual, "has by the law of nature a right to judge for itself, how far its intercourse, either of a commercial or friendly sort, is likely to be detrimental to itself; so that to cut off either or both will be no act of injustice, though it may be wrong, if causelessly done. A nation has a moral power to withhold its benevolence; and they, from whom it is withheld unreasonably, though they are not treated kindly, are not injured. Now it is clear that the power of the State is not exercised with any unreasonable degree of rigour in exacting this petty service from the alien. He is permitted to reside and trade here; his life, his liberty,

and his property are protected in equal degree with that of the citizen; and with what propriety can he complain? Can it be unjust to require him to support that law which protects him? Is it reasonable that he should derive all the benefit which these laws afford and be exempt from rendering any return for the benefit? Is it just in return to the citizens of the country that he should be more favoured than they? No restraint is put on his person. He is at liberty to depart when he please. If the condition on which he is permitted to reside here be onerous, he can rid himself of the burthen, by leaving the State. I think then it is clear, that the act of 1794, requiring aliens to do militia duty, and consequently subjecting them to patrol duty, is neither unconstitutional, nor against the law of nations.

The motion is, therefore, dismissed.

Courtenay & Pepoon, for the motion.

Elliott & Axon, contra.

OHORS *vs.* HILL, LAWTON *vs.* SANE.

Books of accounts are not liable to *Domestic* attachments, so as to create a lien on the debts due the absconding debtor, as in foreign attachments.

This was a motion made before Judge Bay in Charleston, by Mr. *Pepoon*, attorney for the first attaching creditor, Ohors, to have the books of accounts belonging to the absent debtor delivered over to him, claiming the first lien, on the rights and credits of the said absent debtor. This motion was opposed by Mr. *Clarke*, attorney for several subsequent attaching creditors, on the ground, that *they* had first served copies of their attachments on sundry debtors, and on the books of the absent debtor, which he contended gave them a prior right to the sums due on the books; and that they had a preferable claim to the books. Bay J. before whom the motion was made, was of opinion, that the first attaching creditor had a prior lien on the books of accounts of the absent

debtor; as it was the *lodging* of the first attachment in the sheriff's office, that gave the prior lien, and not the first *serv- ing* of a copy of the attachment on a garnishee, and ruled that the books of accounts should be deposited with the clerk of the court, till the first attaching creditor should file his declaration, and then to be delivered to him; and after satisfying the first attaching creditor, then to be delivered over to the subsequent attaching creditor. He referred to *Callahan vs. Hallowell*, 2 Bay, 8. and *Stephen vs. Thayer*, 2 Bay 272.

COLCOCK, J.—The mode of proceeding by attachment is a peculiar one, and we are, therefore, to examine the act for our direction in every particular. There is no authority in any of the acts relating to *domestic* attachments to *levy* on books of accounts, so as to create a lien on the debts which appear by them to be due the absconding debtor. It is observed, that by the foreign attachment act, they are expressly mentioned, and authority is given to the attaching creditor to sue for and recover the debts, to give receipts, &c. none of which provisions are made in the acts which relate to *domestic* attachments, and which are indispensably necessary to effect the purpose of attaching the debts by attaching the books. The purposes of the law also shew that they were not in the contemplation of the legislature; for the acts are intended to stop such moveables as an absconding debtor would be likely to carry away; and, therefore, the words used in the acts, "negroes, goods, chattels and effects;" all of which may be attached. It is then only necessary to consider, whether the creditor, who summoned the persons indebted to the absent debtor, shall receive the debts so due to him. And in the case before us there can be no doubt on that subject. The attachment of the Lawtons was levied in the hands of these persons and they were summoned as garnishees, and have made their returns. These debts are then to be condemned in their hands, for the particular benefit of the creditor who calls them into court as garnishees. This

point was decided in the much contested case of the famous *George Forrest*, who so mysteriously departed from this state in 1811.

The motion is granted.

Clarke for the motion.

Pepton contra.

Exo'rs. BLAKE vs. Exo'rs. R. QUASH, and Exo'rs. R. PINCKNEY.

A shorter period than twenty years in this state, with additional circumstances, will induce the presumption of the payment of a bond.

Having settled an account in the mean time, without any notice taken of a bond, is such additional circumstance, as will induce the presumption of payment in less time than twenty years.

There are cases, in this state, which would warrant a jury in being satisfied with circumstances, to raise the presumption of payment, less strong, than may be required in England.

The acknowledgements, and even part payment, by an heir at law, on a bond, will not suspend the presumption of payment in a suit against the executor.

Under the particular circumstances, the court held the jury might well find for the defendant, after a lapse of fourteen years non-payment on a bond.

It seems there is a distinction between length of time as a bar, and where it is only evidence of it, in the latter case less time may raise the presumption.

An alien enemy, who leaves the country and carries off his bond, is not entitled to interest on it during the continuance of the war.

The reporter could procure no other documents in relation to this case, than the opinion of the court, which, he believes, states the facts sufficiently.

COLCOCK J.—In this case, in addition to the ground mentioned in the brief, it was urged on the part of the defendant, that the bond had been fully paid, for that the debt, having been the property of a British subject, and the bond carried by him to England when he left this country, that interest should not be allowed during the war. The doctrine of a presumption of payment arising from length of time is now

well established, and I feel no disposition to disturb it. But there are some considerations which present themselves to my mind, and which I submitted to the jury to induce a presumption of payment in this country on circumstances less strong than would be required in England, where the full period of twenty years had not elapsed; still, however, adhering to the doctrine, that where a shorter period than twenty years had elapsed, there must be some additional circumstance to induce the presumption. When the doctrine of twenty years affording, *per se*, a presumption of payment was established, I cannot suppose that any thing more was intended than to fix some period at which the legal presumption should arise. It was not intended to preclude a presumption arising from any other circumstances than lapse of time; for I take it, that payment, like any other fact, may be proved by presumption arising from any circumstances which in their nature are calculated to induce belief. In *1st Selwyn's Nisi Prius* p. 589, it is said, where a bond has lain dormant for a less time than 20 years, some other evidence than mere length of time must be given in order to raise the presumption that the bond has been satisfied; *such as having settled an account in the mean time, without any notice having been taken of such demand, and so forth.* Where the time elapsed is considerable, though short of 20 years, the slightest evidence will be sufficient; (*1st. Campbell's Nisi Prius Cases*, 27.) In the case of *Oswald vs. Legh*, (*1st. Term Rep.* 282,) Lord Mansfield said, there was a distinction between length of time as a bar, and where it was only evidence of it. The former was positive, the latter only presumption; and he added, as his own opinion, that it might be eighteen or nineteen years. It has been asked, whence the twenty years? Why that number of years, and not a shorter term fixed on, as affording a presumption of payment? By some it is said to have been adopted in analogy to the limitation of real estates. By others, because in 20 years, according to the rate of interest allowed in England, (6 per. cent. per. annum,) a

bond doubles itself, and it is not reasonable to suppose that one would allow his debt to remain unpaid, when it ceases to be cumulative, it will, therefore, be presumed, that it has been paid off, if not demanded within the 20 years, or interest paid. Now whether it be traced to the one source or the other, we may certainly apply the maxim, "*cessante ratione, cessat et ipsa lex*;" for here the limitation to actions for the recovery of real property has been heretofore 5 years, (and is now ten) and the rate of interest being 7 per cent. per annum, a bond would be doubled, or the condition amount to the penalty, in 14 years, two or three months. But as we cannot clearly ascertain the origin of the doctrine, we are not authorized to alter the rule; yet there are circumstances which would seem to warrant a jury in being satisfied with circumstances less strong than may be required in England. By applying, however the law to the case before us, it will appear that the verdict of the jury may be well sustained in every point of view. This is an action against the executors of the testator. The last payment made by an executor was on the 3rd February, 1778, a period of 47 years. Thirty eight years expired from the last payment by an executor to the commencement of the suit, which was in April 1816, during which time, no demand was proved to have been made on the executors or any recognition by them of the existence of this debt. As to them, then, the rule, in its utmost extent, has been satisfied. And here I might rest the case; but payments have been made by the heir at law as late as the 27th July, 1802, to Mr. Charles Lining, in whose hands, this bond had been placed, which it is urged is a fact contradicting the presumption of payment. Now the first objection to these payments producing such an effect is, that they are not made by the executor, and, therefore, cannot weigh against the presumption arising in their favour. If they amount to an acknowledgment of the debt, the acknowledgment is not made by them. Let it operate, if it can, against him who made it. How does the heir know that the debt is not paid? But suppose these payments

do counteract the presumption of payment, arising from the lapse of time; to wit, of 38 years silence on the part of the plaintiff; yet since the last payment in 1802, to the commencement of the suit in 1816, fourteen years have elapsed, which, with the other circumstances of this case, will support the verdict. The heir at law and Lining lived in the same Street in the same city. Lining was well known to be peculiarly attentive to the discharge of his professional duties, and, therefore, it is fair to presume that the bond was paid. But all doubt is removed by the consideration of the second ground. By a calculation made by the clerk of the court, it appears, that, omitting the interest from the last payment made by the executors to the time of making peace, in 1802, the bond had been over-paid by one hundred and thirty-seven pounds. It was satisfactorily proved that one John Dennis was the owner of the bond, who was a British subject, and continued in his allegiance to that government, and that he left this country during the war, and it is well known, that such persons sent or carried the evidences of debts due to them out of the State to prevent their being paid in depreciated money, or to secure them from falling into the hands of the debtors, on a reverse of affairs during the war. Under these circumstances then, the plaintiffs are not entitled to interest during the war. In reply to this, it was said, the right to receive it was secured by treaty. But this, I consider, as having been put to rest by many decisions made by the different courts in the United States, as well as by the able exposition of the subject by Mr. Jefferson in his correspondence with Mr. Hammond, the British Minister. The four grounds on which the payment of interest during the war is resisted, are :

1st. That interest is given as an equivalent for the use of money; and that where, by any public calamity, the debtor is prevented from making a profit on his money, he ought to be obliged to pay interest, and the more especially when such calamity is produced by the creditor himself.

2nd. That where a creditor withdraws himself from the state, the debtor is not obliged to follow him to pay the debt, (though he may be obliged to seek him, if he remains within the realm) and if he prevents the payment of the debt, he is not entitled to interest.

3rd. That by preventing the exports of produce, not only were the debtors prevented from paying the interest, but their capital was diminished by the depreciated value of the products of the soil, and the increased value of the necessities which were required from abroad.

4th. Because, that if the debtor had been willing and able to pay, and could have obtained access to his creditor, yet that policy forbids the payment, as he would have thereby strengthened the hands of his enemies.

These grounds, it is not now necessary to expatiate on, inasmuch as they have been the subject of repeated discussion, both in our legislative and judicial tribunals. These views of the case render it unnecessary to make any observations on the plea of *plene administravit*, though I do not hesitate to say for myself, that I think the evidence of the executors having delivered up the property in 1793, would have been a sufficient protection to them, had the proof of the non payment of the debt been ever so conclusive. The letter of Mr. Pinckney, which has been submitted to the court, cannot operate against the executors, and consequently does not furnish a ground for new trial.

Grimké for the motion.

Hunt contra.

CAMBERFORD vs. HALL.

The garnishee cannot take advantage of any errors or irregularities in the proceedings against the absent debtor. No one but the debtor can take advantage of errors.

A judgment is not void because it is erroneous, if it be rendered by a court of competent jurisdiction; until reversed by the defendant himself, it is only voidable.

So, if an attachment be taken out without the plaintiffs giving bond, only the defendant himself can make the objection.

Tried at Walterborough in November term, 1825, before Mr. Justice Waties.

In this case, a writ of domestic attachment was issued, in which judgment was recovered by default against the defendant, and entered on record on the 5th July 1825. Clairborn was the garnishee, on whom a copy writ of attachment had been served. The case came before the court below upon two motions made before Judge Waties, presiding. The first was a motion by the attaching creditor, Camberford, for leave to enter up judgment against Clairborn, the garnishee. This was opposed by *Raysor* and *Edwards*, for the garnishee, who as his counsel also made a motion to set aside all the proceedings, as absolutely void, under the act of 1785. This motion was opposed by the attaching creditors. The presiding judge refused the motion of the attaching creditor, and granted the motion of the garnishee, on the ground, that the attachment was absolutely void, on the authority of *Gray and Young*, (*Harper's L. R.* 38,) because the bond was taken for \$300, double the cause of action, and not for double the damages or sum sued for.

From this decision the attaching creditor appealed, and moved the court of Appeals to reverse the same, and for leave to enter judgment against the garnishee; because,

1st. The presiding judge erred in ruling that the garnishee had a right to question the regularity of the proceedings against the defendant.

2nd. Because the presiding judge also erred in ruling, that the attachment could be set aside on motion.

COLCOCK, J.—It has been repeatedly decided by this court that the garnishee cannot take advantage of any errors or irregularities in the proceedings against the absent debtor. The protection which the law has furnished to the property of the absent debtor is intended for his benefit, and not that of a third person. The bond which the law requires is to shield him from unjust suits; if he, therefore, does not think fit to complain that the bond has not been taken in conformity with the requisitions of the act, why should any other be permitted to do so? (1 *McCord* 116.) But it is said the act declares the attachment void, if the bond be not taken in double the sum to be attached; and that the bond not being so taken, the court is bound on motion of any one to set aside the judgment, and dismiss the attachment as a mere nullity. The court is not bound to set aside a judgment on any ground of error or irregularity, as already stated, except at the instance of the defendant. A judgment is not void because it is erroneous. If it be rendered by a court of competent jurisdiction, it must remain until arrested or reversed, (See 2 *Dane's Am. Dig.* 636. sec. 9. where the authorities are all referred to.) This principle was recognized in the case of *Kemps, Lesse, vs. Kennedy*, (5 *Cranch* 173,) by Chief Justice *Marshall*; and *Hawkins*, (2 *Vol. Chap.* 29, sec. 40,) says, an erroneous judgment is not void but voidable by writ of error. The word "void," when used in a legislative act, on such a subject as the one embraced in this act, is to be understood synonymously with "voidable," that is, it will be declared void on pleading. In 5 *Rep.* 119, in *Whelpdale's case*, it is said when an act of parliament says that a deed, &c. shall be void, it is intended that it shall be by pleading; so that it is voidable but not actually vacated.

The motion is granted.

Clarke and Warren for motion.

Edwards and Raysor contra.

FIFE, & Co. vs. CLARKE.

In case of a foreign attachment, where the defendant comes in and enters into special bail to the action, as is required by the act, the lien of the attachment is dissolved; and it becomes as any other case, where bail has been given: *Colcock, J.* dissenting.

The giving bail, under the act, changes the proceeding *in rem*, into a proceeding *in personam*.

Tried before Mr. Justice Bay.

Motion of Pettigru, Attorney General, for a mandamus to the clerk of the court of common pleas to take special bail in an attachment, in the same manner as if defendant had been taken on a bail writ.

On the 26th October, 1825, the plaintiff attached the defendant, who was then absent from the State, by his lands, &c. to make him a party in court, and answer to an action of assumpsit. On the 17th November following, defendant having returned to the State, offered to dissolve the attachment by putting in special bail; and the question was whether the condition of the recognizance should be in the form contained in the books of practice in the alternative, viz : *to pay the condemnation and costs, or render himself to the custody of the sheriff*, or whether the condition should be absolute, *to pay*. The clerk refused to take a recognizance of bail piece in the alternative, on which the defendant moved judge Bay, for an order or mandamus to require the clerk to take the recognizance in the alternative.

BAY, J.—Delivered the following opinion below :

Without hesitation I feel myself constrained to refuse this motion ; as from the nature of the bail required by the 8th clause of the attachment act, it differs very materially from the bail required in common cases of arrest for debt; as in the one case the nature of special bail is in the alternative, to pay the condemnation money, or to render the body of defendant; whereas the 8th clause of the attachment act, requires that the attorney or other person coming in to dissolve the attachment and his security, shall be obliged to

enter into bail *to pay and satisfy all such sum and sums of money as the plaintiff in attachment shall obtain judgment for, against the absent debtor*, that then the attachment shall be dissolved and the goods and chattels, debts and books of accounts attached, shall be given up and delivered to the persons appearing and giving bail as aforesaid. The above clause, to be sure, supposes that the absent debtor still continued out of the State, and that his attorney on his behalf, had come in and given the bail abovementioned, in order to dissolve the attachment and get back the goods &c. But whether the attorney or the principal debtor himself returns and applies to have the attachment dissolved, it is clear, that from the nature of the security itself, the security must be absolute, to pay the debt to be recovered from defendant; and the reason of the thing itself appears to me to be obvious; for as the plaintiff in attachment had obtained a lien on the defendants goods &c. it was but fair, that he should have an absolute and unconditional security for his debt, before he could be compelled to relinquish his lien on the property attached. I was, therefore, of opinion that the prothonotary, or clerk of the court, acted regularly and agreeably to the uniform practice of the court, from time immemorial in such cases, by refusing the bail offered by defendant, and further that the rule for a mandamus should be dismissed.

From this opinion an appeal was taken to the Supreme court, and it now came on for judgment.

NORR, J.—The only question submitted to our consideration in this case, is, whether an absent debtor, whose goods have been attached in his absence, can on his return to the State, dissolve the attachment by entering special bail to the action? It need not be observed, for the purpose of giving information to the bar, that previous to our attachment act, the only process by which a person could be made a party in court was by a *capias* directed against his body. There was no method, therefore, by which a creditor could have access to the property of an absent debtor, so as to

so as to subject it to the payment of his debts. The object of the attachment act was to remedy that inconvenience. It was intended to operate in the nature of a *distringas*, to coerce the appearance of the defendant, or, in case of his default, to make his goods liable to pay his debts. That it was intended as the means of compelling his appearance, is apparent from the words as well as the spirit of the act. The second clause requires that the plaintiff shall serve the wife or the attorney of such absent debtor with a copy of his declaration, with a special order of court endorsed thereon, ordering when such absent debtor shall "plead or make his defence," to such action. And if the said absent debtor shall not "appear and make his defence," then the plaintiff shall have judgment, &c. It is obvious, that from this provision, as well as from the general scope and design of the act, that the personal appearance of the absent debtor was contemplated in order that he might plead and make his defence. The first enquiry then is what are we to understand by the words, "appear and make his defence." *Blackstone*, (Vol. 3, 290,) speaking of the method of proceeding in cases of arrest, says, "upon the return of the writ or within four days after, the defendant must appear, according to the exigency of the writ." "This appearance, he says, is effected by putting in and justifying bail to the action." Here then we have the technical meaning of the word "appear," in cases of arrest, and that is the sense, I imagine, in which we must understand it in this act. The legislature intended to give the plaintiff all the advantages which he would have had, if the defendant had been present, so that the ordinary process of law might have been served upon him, and nothing more. It was not intended to place the defendant in a better situation. He must be considered, therefore, as under an actual arrest by the attachment of his goods, instead of his body, which therefore, stand as security for his appearance; which appearance, we have seen, can be effected only by putting in special bail to the action. Such is the practice in Pennsylvania,

(*Sergeant on Attachment* 20.) And it appears by the same author (p. 16,) that the only security authorized by their act is, "to answer and abide the judgment of the court," and he expressly says, "that in a case of foreign attachment a common appearance cannot be ordered." Such also is the practice in Maryland. (*Campbell and Morris*, 3 *Harris* and *McHenry*, 535) And the reason is obvious. The defendant being absent, no process has been served upon him, and there is, therefore, no connecting link between him and the plaintiff, until he makes himself a party by entering bail to the action.

The next question is, what is the effect of entering bail to the action? The act does not say that the effect shall be a dissolution of the attachment. But that must necessarily be the result from analogy to all our legal proceedings. The process cannot be at the same time a process *in rem* and a process *in personam*. As soon as it attaches upon one, it loses its hold upon the other. Such is not only the practice in the United States, but it was such under the custom of London, from whence the principles of our attachment act have been borrowed. (*Sergeant* 131-132. 1 *Com. Dig. title Att. E.* 718.) Now, it is said we have nothing to do with the custom of London; for that custom does not prevail here. It is true we are not governed by the custom of London; but surely we may look to the source from whence any of our laws are derived, whether the common law, the civil law, or the custom of London, to ascertain the meaning of any word introduced from thence, or the sense in which any well known word was there used: Thus for instance to ascertain the meaning of the word Bankrupt; used in our constitution, we may be permitted to go to the English laws and English decisions from whence it has been derived, although those laws are not of force here. The doctrine in relation to *feme-sole-traders* has been introduced here from the custom of London, and we have had occasion, more than once, to resort to that custom to aid us in deciding cases re-

lating to that subject. With regard to the meaning of the word *attachment*, as used in the act, where else shall we go? It was not known to the common law, in the sense it is there used. It is to that source, therefore, and to that alone that we must look for its application. The same may be said of the word *garnishee*; we shall look in vain for it in the common law. From the very source then from whence our doctrine of attachment has emanated, we learn that the appearance was by entering bail to the action, and that by such appearance, the attachment was dissolved. It is said that the absent debtor cannot stand in the relation of a defendant who has been arrested, because the plaintiff is not required to make an oath of the justness of the demand before he issues the attachment. I do not know why the legislature thought proper to dispense with an oath in such case. But that furnishes no reason why the defendant should not substitute himself in the place of his property, when he relieves that from the lien which the plaintiff had upon it. Such, I find, is the practice in Pennsylvania, although no oath is required, and, that much of their law upon the subject and most of their forms of proceeding are borrowed from the proceedings under the custom of London, and have been sanctioned by legal adjudications and practice. (*Sergeant* 5. 8.) I think, therefore, that I have succeeded in shewing that such was the practice under the custom of London, and that such is the practice in Pennsylvania and Maryland, and, I suspect, that such will be found to be the practice in all the States which have attachment acts.

I now come down to our own decisions, and, I think, I shall be able to shew that such has been the practice in our courts according to the uniform construction heretofore given to our act. I will begin with the case of *Crocker and Hitchborn vs. Rudeliffe** argued in the year 1808, and decided in 1812. In that case, it was held that an attachment was a process *in personam*, and not *in rem*; and, therefore, abated by

*4 Brev. M. S. Rep. 85, in possession of the Reporter.

the death of the absent debtor. How could it be held that it was a process *in personam*, but upon the principle that the absentee by making himself a party to the suit, dissolved the attachment. It could not be by entering a common appearance; for that would not dissolve the attachment, and it would still be a process against the goods. It could not be under the eighth clause, for that does not contemplate the appearance of the absent debtor; but makes his attorney personally liable for the debt. Judge *Brevard* in the opinion which he delivered in that case, says, "it was intended to constrain the appearance of the absent debtor. If he appear, he may give bail and dissolve the attachment. Upon giving bail the property is discharged." Judge *Grimke*, in the same case, says, he may appear to the action and plead within a year and a day, and dissolve the attachment. In the case of *Gray & Young*; (*Harper's L. R.* 40,) it is said, "the writ of attachment, although a sort of proceeding *in rem*, like any other original writ, is intended to bring the defendant into court, and if he do appear and plead to the merits, like every other, it is *functus officio*. Its peculiar characteristic is lost, and from thence the proceeding is merely personal, and must be governed by the same rules. In the same case, it is said, "the bail might have surrendered the principal," which could not have been, if he had not entered special bail to the action. I do not know that the nature of the bail which had been given in that case, was brought to the view of the court; yet it shews the opinion which they entertained on the subject. In the case of *Acock vs. Linn & Lansdown*, (*Harper L. R.* 366,) it was decided that the defendant could not be permitted to make defence by entering a common appearance; but that he must dissolve the attachment by entering special bail to the action. In that case also, he is considered in the same situation as a person actually arrested, who as we have already seen could be permitted to plead only by entering special bail. And the case of *Campbell & Morris*, (*3rd Harris & McHenry's Reports*, 535,) is to the same effect. After

doubt about the law or the practice in our courts. The 8th clause of the act, on which so much reliance has been placed, has nothing to do with the question. That clause relates to another subject. It allows a third person, and not the defendant himself, to dissolve the attachment by making himself and his security liable for the debt; And in that case he must pursue the method therein prescribed. But I go farther and hold that the correctness of this procedure, if not authorized, may be inferred from a clause in the act of 1785, which is in these words, "all attachments shall be replevable by appearance and putting in special bail, &c." It is now contended that this was a provision of the county court act, which relating altogether to those courts, has been repealed. It is true, it is found in the body of an act, the principal object of which was to establish county courts, and to regulate the proceedings therein, which act has been repealed. But many of the provisions of that act were intended to have a general operation and still remain unrepealed. Such are the several clauses relating to the recording of deeds, those relating to bail and some others, and all the parts of the act relating to the subject of attachments are of this description. The object was to authorize the magistrates throughout the country to issue domestic attachments, which had not been previously allowed in this State. When the sum was within the jurisdiction of the county courts, the attachment was returnable to those courts, but where it was above their jurisdiction, it was required to be returned to the district court. It was at first limited to those parts of the State in which county courts were established. But in the year 1788, the same power was extended to the magistrates in the other districts. The act then became a part of a system having a uniform operation throughout the State; and in the act of 1785, is to be found the clause to which I have referred. I do not think, therefore, that it can be a violation of any rule of construction to extend its application to all the acts upon the subject. It is not to be supposed that the legislature intend-

ed to adopt different rules of proceedings on the same subject: It must, therefore, have been intended to establish a uniform practice in all cases, or to conform the practice in cases of domestic attachments to what was then considered the settled practice under the former act. A different construction would render the act so oppressive that nothing but words, too plain to be resisted, would make me believe that it could have been the intention of the legislature. It would put it in the power of any creditor, who should be a little more prompt than the rest, as soon as an insolvent was without the limits of the State, to convert the whole of his property and debts to his own use, to the exclusion of all the rest, if he should happen to owe him so much. Such a proceeding is so contrary to the spirit of our laws which contemplate an equal distribution of effects of an insolvent debtor, that we cannot suppose that it even entered into the contemplation of the Legislature. It would not only put it in the power of one creditor, thus to prevent all the others from having any participation in the property, but it would enable him to render insolvent a man before in independent and prosperous circumstances. Suppose a merchant in Charleston to owe twenty thousand dollars, and to have in active employment stock in trade to exactly that amount, and as much more in outstanding debts, such a man would be considered worth twenty thousand dollars clear of debt. If he should leave the State for the most honest purpose his property would be liable to attachment. And an attachment from one individual would bring down all his creditors upon him. The sheriff has no means of ascertaining the exact amount or value of the property attached. He must take enough to satisfy the debt at the lowest estimate at which it would probably sell. The debtors of the absent party are summoned, as garnishees, to declare how much they are indebted to him without regard to the respective sums actually due. They are not permitted to pay any part to the absent

debtor, until it is ascertained how much is due to the attaching creditor. The consequence is, his funds are locked up to twice the amount of what he owes. His friends are afraid to assist him, for they cannot know his situation. They would become his bail, but not security to pay his debts. They would trust his property when they would not trust his honour. His goods must be sold under the hammer; perhaps, at half their value. His debtors die, become insolvent, or move away, and before the matter is brought to a close, he is a ruined man. This is not an imaginary case, it is a true picture of the state of things which would result from the construction of the act now contended for by the plaintiff in this case. Such a construction, would, as was well observed, in the course of the argument, make a departure from the State for a mere temporary purpose an act of bankruptcy of the worst kind. And it would put it in the power of one man, not only to appropriate all the effects of an insolvent man to his own use, to the exclusion of all the rest of his creditors, but would put it in his power to render one insolvent who was before in good circumstances. It is said that the construction contended for by the defendant would enable dishonest debtors to enter into combinations with certain creditors to give them a preference to others, extremely injurious to the commercial interest of the community; but that may be done under any construction. Not more so under this, than any other. It would be no more difficult to enter into collusion with a creditor to be the first to attach, than to give a preference after the attachment was served. Commercial prosperity depends upon the active employment of capital and not in keeping it locked up; in an equal distribution of insolvents' estates and not in giving them exclusively to one, or to a few. And, except a few creditors who may now have got a preference by their attachments, there cannot be a merchant in Charleston who can wish a construction of the act to prevail, which would lead to such consequences. I am of opinion, therefore, that the

decision below, ought to be reversed and that the defendant be permitted to enter special bail to the action. (a)

COLCOCK, *J. dissenting*.—A sense of duty impels me to state my reasons for differing in opinion from my brethren in this case. When I reflect that the act has been in operation for eighty years, and that the practice under it, on the point now before the court, has been uniform and uninterrupted, I cannot but think, that the law is now established, even although the act were susceptible of the construction contended for. If eighty years is not a sufficient length of times to fix the meaning of an act, there can be no security to the citizens of the community. Will it not better comport with that security, to continue in the old construction of the act, than now to depart from it? Surely authority on this subject will not be required. Reason unaided by authority points out the great importance of uniformity in the law. Why do we daily refer to adjudged cases to determine between conflicting opinions as to the common law? Why at this very court have we said we were never satisfied with the case of *Purvis vs. Robinson*, ante, 321, but, that as it had been the law for thirty years, we thought it best not to disturb

(a) (Note by his Honor.) Since writing the above opinion, I have seen the Pennsylvania act. There is no provision authorizing the defendant to dissolve the attachment by entering special bail to the action. The act provides that where the sheriff shall attach goods in the hands of a garnishee, he may take possession of them, "unless the garnishee will give security therefor." The condition of the bond in such case is to "abide and perform the judgment of said court." (*Sergeant* 209.) The act further provides in cases where the garnishee has thus entered into such bond, that if the plaintiff in the attachment obtain a verdict, judgment and execution, for the money and goods in the garnishee's possession, yet the defendant in the attachment may, at any time before the money be paid, put in bail to the plaintiff's action, upon which the attachment is grounded; whereby the garnishee will and shall be immediately discharged. I infer, therefore, from what *Sergeant* has said, with regard to their practice, that he might, as a matter of course, dissolve the attachment at any time previous to such judgment, by entering special bail to the action, in the usual form.

it. Is it not obvious that the same course ought to be pursued in the construction of this statute? But I will now endeavour to shew that this act is complete in all its parts, that it forms an entire system on the subject, and is not liable to the objections which have been raised against it by the counsel. In a proceeding of this kind it is conceded that it is proper to provide a mean whereby the absent debtor may obtain that justice in court, which is administered to all. While his goods are liable to be seized to satisfy a just demand it is proper that he should be permitted to defend himself against unjust claims. The act provides first, that the goods of any person or persons whatsoever, residing or being without the limits of the (then) province, shall be attached in the hands of any person having possession of them, or wheresoever they may be found. It then requires the plaintiff to file his declaration, to swear to his demand and to serve a rule to plead on the wife or attorney of the absent debtor, if he have one within the state fixing a time within which he shall plead or make his defence; and if he have no wife or attorney, to advertise such rule once every three months during a year and a day; and if he do not appear within that time, judgment is to be rendered against him. Then follows the clause which provides that the attachment may be dissolved within the year and day, "by entering bail to answer the action and pay the condemnation. Here then is a complete system, providing a remedy on the one hand for the plaintiff, and on the other, the means of defence for the defendant, which is all that the law is expected to do by any proceeding whatever; but to that is superadded a privilege, which is not allowed in ordinary cases, namely, permitting the defendant (in the very next clause) to disprove the debt, at any time within two years, and to recover damages against the plaintiff for any unjust vexation, with treble costs. But it is said that the eighth clause of the act only authorizes the dissolution of the attachment by an attorney, the debtor himself being absent, and that he is to be permitted to dissolve it himself by entering special bail. The clause is in the fol-

lowing words: "if at any time within the year and day, any person shall appear as the attorney to the absent debtor and will put in bail to answer the action and pay the condemnation, that then in such case the attachment shall be dissolved, and the monies, goods, chattels, debts and books of accounts, so attached, shall be forthwith paid and delivered to the person and persons appearing and giving bail as aforesaid, and such person and his security shall be obliged to satisfy and be liable to pay all such sum and sums of money, as the plaintiff in the attachment shall obtain judgment for against the absent debtor, together with all such costs and charges as shall be taxed by the chief justice aforesaid." Now, it is a well known rule that wherever one is authorized to do an act by attorney it implies an authority to do it himself, and for this it would be sufficient to rely on the trite maxim, *qui facit per alium, facit per se*. But the words "absent debtor," and "defendant" are controvertable terms in the act, and, therefore, the words, "absent debtor," in this clause, do not necessarily convey the idea of absence. The object of the law is clear, if the debtor does not intend to return within the year and day he may appoint an attorney to dissolve the attachment, or the attorney who is left to transact his business, may do so for him; but if he return within that time he himself may give the bail required by the act, and thereby dissolve the attachment; and this is the construction which the act has always received. But it is said that this plain and obvious meaning of the legislature is to be abandoned, and it is to be inferred that they intended to permit the absent debtor on his return to dissolve the attachment by entering special bail. To support this construction it is said, that such was the mode of proceeding by the custom of London, from whence we derive all our knowledge on the subject. Nay, it was even said, we did not know the meaning of the term "attachment," as a proceeding to bring a party into court, except by a reference to the practice under that custom. *Blackstone*, (3rd vol. p. 280,) in treating of processes, says, "if the defendant disobeys this

verbal monition, the next proceeding is by writ of attachment or *pone*. This is a writ, not issuing out of chancery but out of the court of common pleas, and thereby the sheriff is commanded to attach him by taking gage, that is, certain of his goods which he shall forfeit, if he doth not appear; and in some cases, this is the first and immediate process." We are not then obliged to the custom of London, for the first information as to this mode of proceeding. But suppose by the custom of London, the absent debtor is permitted to dissolve the attachment by entering special bail, does it follow, that we are obliged to pursue the same course? Can it be believed that the legislature when providing a remedy by this mode of proceeding, would have failed to do so by express provision, if they had deemed it advisable? Could they suppose that any deficiencies in their act would be supplied by the custom of London? Was it operative here? They were not legislating on a common law subject. But to meet these objections which so forceably present themselves to the mind, it is said, that the act implies this right in the defendant by speaking of his "appearance," which, it is said, is a technical expression, meaning the giving of special bail. But there are some serious objections to this strained construction of the act. Although the books of practice do say that "appearance" means the entering of special bail, they do not mean that an appearance cannot be entered without special bail. Where bail below has been required, it is demandable, but it certainly was never heard of that an appearance cannot be entered on a common *capias*, where no bail has been required, without special bail. When was special bail ever demanded in a case when there was no affidavit to hold to bail? The word *appearance* then, has no such technical meaning as is necessary to support the argument. Our acts of assembly, as well as our rules of court, recognize the idea of appearance without any bail. But a still more obvious objection is this, the act does not speak of the appearance, in terms, of the absent debtor until the judgment shall have been

rendered against him. In the ninth clause, it says, "in case any absent person, against whom an attachment is issued by virtue of this act shall appear within two years." Now whatever may be the technical meaning of appearance, this clause could never have contemplated the entering of special bail, for it is introduced to give a remedy where the defendant has been unjustly harrassed by the proceeding, and is after judgment; and it would shock our technical notions to talk of special bail after judgment. In the second clause of the act, when the rule to plead is ordered, the technical word "appear" is not used. The words are "ordering when such absent debtor shall plead or make his defence." Now we certainly often see mere pleading and making defence without entering special bail. The latter part of the clause speaks of his non-appearance, but I shall not stop to shew that that cannot technically give a right to enter special bail. Why, I ask, if the legislature intended that the attachment should be dissolved by the absent debtor's entering special bail, did they not make an express provision for it, and extend the power to his attorney also? The legislature of Pennsylvania have thought it necessary to do so, although it is the custom of London. (*See Sergeant's Law of Attachment* p. 7.) And our legislature in the act of 1785, relating to domestic attachments have thought proper to say that "goods taken under such attachments shall be repleviable by appearance and putting in special bail, if by the court ruled so to do; or by giving bond with good security to the sheriff or other officer serving the same to "abide by and perform the order and judgment of the court." It is said, when there is ambiguity in a statute we must refer to the law as it stood before, to see what is meant. But, I ask, does every difference constitute an ambiguity? If so, no alteration could take place. If a statute cannot be carried into operation from any apparent ambiguity, we may certainly endeavor to discover the meaning of the legislature by looking to the old law. If we want to know the meaning of

special bail in a statute, we might refer to the common law. But to use this rule to introduce into the law an important matter which has been omitted, is not to construe but to legislate. If any stress be laid on the use of the words, "special bail" in the law of domestic attachments, as an authority to introduce it into the law of foreign attachment, I would remark, that it is only necessary to look into the act to see, that he who drafted it has confounded all the distinctions of the common law as to bail, and that it is required only where the court shall order it, and may, therefore, be considered as an additional security to that which may be given to the sheriff or other officer levying the attachment. The word is used in some of our decisions concerning domestic attachments, but never in its common law meaning, but always in reference to the act itself, which provides for a special bail of its own, and generally in this state as meaning bail above. But let it be granted that there are no means by which an absent debtor in a foreign attachment can dissolve the attachment by entering special bail. Have not the legislature a right so to make the law? The argument was introduced with some observations on the severity of the law, that it operated cruelly on honest men, that a man could not put his foot beyond the limits of the state without being subject to the attack of an ill-natured creditor. If these observations were correct, still they would not weigh with judges who are to enforce, not to make, law. Time does not permit me to enter much at large into this part of the subject, but I shall endeavour briefly to show that it cannot produce any bad effect on a prudent man; and it is not required of the law to protect men from their own folly. The ninth clause provides that if one going out of the state will give a months public notice of such intention, he shall not be subjected to the provisions of the act. His goods cannot be attached for any debt then due, and every man of business, when leaving the state, should appoint an attorney. With these guards, how can a prudent man be injured? If his property be attached for

any debt due after he leaves the state, his attorney may give the security required for him, and his goods and all his funds are a counter security to him. But it is said, suppose the debts amount to more than his stock in trade, and his whole capital. The answer is, he is a bankrupt, and the law is not in fault. If a man will go so far beyond his depth, it is not the fault of the law if he sinks. Such extravagant speculation should certainly never be encouraged; it is gambling at the public expense. Again, it was said, that one or two of the most active creditors might get the whole of his property. And what is the remedy proposed? Suffer him to enter special bail, dissolve the attachment, get the goods into his possession and give them to two or three other creditors whom he may prefer or who may not have attached; and that this is often done, no man of business can doubt. Indeed it is the only way by which the individual can go on. If it should be urged that all creditors should come in in equal degree for the effects of a bankrupt, I will readily accede; and an amendment of the law in this particular would be highly proper and universally approved of; but that justice among the creditors is not as well effected by the decision in this case as by the former operation of the act admits of no doubt in my mind; for the late occurrences in the commercial world show that it is at last but a contest among creditors who shall get the advantage.

Petigru and Harper for the motion.

King contra.

THE STATE vs. ELIZABETH BLYTHE.

Under the act of assembly 1819, requiring the owner, or some white person, to reside on all plantations, whereon there are more than ten working slaves, he may live on any part of his land, forming the same plantation, that circumstances may render convenient, however distant from his slaves.

Tried, at Georgetown in the Fall Term, 1825.

The defendant in this case was indicted under an act of the legislature, passed in the year 1819, entitled An act to provide for the more effectual performance of patrol duty. The clause of the act in question is in the following words: "That every owner of a settled plantation shall employ and keep on such plantation some white man capable of performing patrol duty, under the penalty of fifty cents per head per month for each and every working slave which may be on such plantation, to be recovered by indictment, one half to the informer, the other half to the use of the State : *Provided*, always that nothing herein contained shall be construed to affect any person or persons who resides on his, her or their plantation for the space of seven months in the year &c." The facts as reported by the presiding judge are, that the defendant lived in her house in Georgetown seven months in the year. Her lot adjoins her plantation and the negroes of the plantation were living at a short distance from her house. There was a street between; but she owned all the land from her house to the point. Upon this statement of facts, the jury found the defendant guilty, and the question was, whether the evidence authorized a conviction.

NOTE J.—The word plantation, in common parlance, means any body of land consisting of one or several adjoining tracts on which is a planting establishment; and in that sense, it has heretofore been held by this court, it must be understood in the act now under consideration. In deciding this case, we must look to the object and policy of the law, and give it such construction as, consistent with its letter, will be best calculated to carry into effect the intentions of the legislature in its enactment. The object was to

prevent that intercourse and unlawful combination of slaves which is calculated to endanger and disturb the peace of the community. It, therefore, requires the owner to reside on his plantation or to keep some white person there capable of exercising the same authority and control which the interest of the owner would induce him to exercise; but he may live on any part of his land as health or any other circumstance may render convenient, however distant it may happen to be from his slaves; and whether part of his land should happen to be checked off upon paper or parchment as town lots or not, can, in my view, make no possible difference in the construction of the act; nor can it be important whether the owner lives on the North or South side of a street, or above or below a mere ideal line, which constitutes the boundary between his plantation and a town. Suppose Mrs. Blythe actually had a white man living on the lot where she resides, whose duty it was to be with her negroes every day and to visit their houses at night as often as might be thought necessary; or suppose a gentleman, the owner of a plantation residing in the same situation and superintending his own business, could there be any doubt that it would be a compliance with the regulations of the act? And in legal contemplation, Mrs. Blythe is in the same situation. For although we cannot suppose that any lady will attend to all the minute detail of her plantation business, yet she satisfies the law by being in a situation which enables her to do so. All the mischief intended to be prevented, is sufficiently guarded against. I think, therefore, that Mrs. Blythe has amply fulfilled, if not the letter, the spirit of the act, and that a new trial ought to be granted.

KING & JONES *ads.* SARAH JOHNSON.

It is not usurious to sell or buy a negotiable paper, founded on a legal consideration, for less than its nominal value.

So where a note was given for money advanced, to be returned to the drawer when he should pay a debt to which the drawee was security for him, and the drawee indorsed the note and traded it off before it became due at more than the rate of legal interest, it was held not to be void in the hands of an innocent holder.

It seems the transaction would not have been usurious in the hands of any body, as the original consideration was legal.

Where a note, on a legal consideration, is drawn to order, and indorsed, no matter how often it has been polluted in the hands of intermediate holders, it is still valid in the hands of a bona fide holder.

This was an action of assumpsit on a promissory note. The indorsee against the drawers. Tried before the recorder of the City Court in July Term, 1825.

The note in this case was drawn for \$862 80, by the defendants in favor of James C. Brown, and by James C. Brown, indorsed to the plaintiff, dated 20th November, 1823, payable seven months after date. The defence was usury.

Myer Moses, proved that James C. Brown bought certain sugars from Edmondston, which he bonded at the custom-house; that John King, one of the defendants, became the security of Brown in two bonds which he gave for the duties upon the sugars; that in consideration of King's, becoming security, it was agreed between Brown and himself, that he should have the use of one half of the amount payable for the duties; King stipulating when the bonds became due to pay one half of the sums for which they were given. The bonds became due in six and nine months, and Brown, upon King's subscribing the bonds, gave to him one half of their amounts. King at the same time delivered to Brown the promissory note of King & Jones for the same sum as a memorandum of the transaction. The agreement between King & Brown, was, that if King paid one of the bonds, the note of King & Jones was to be returned to him; but if King did not pay one of the bonds, then he was liable to the payment of the note. King did pay one of these bonds to the knowledge of

the witness. Joshua Brown, the father of James C. Brown, attended to, and transacted all the money concerns of the latter. When Joshua Brown, was in his last illness, the witness called upon him and asked him about the note of King & Jones; Joshua Brown told the witness, his necessities compelled him to part with the note. The witness said, he ought not to have done so. Joshua Brown replied, that King should never suffer from it. Moses also said that all the business carried on in the name of James C. Brown was conducted by Joshua Brown.

Charles O'Hara deposed that he first saw this note in the hands of Joshua Brown; that Brown told the witness, he had loaned the amount of the note to King and received from him the note in payment. The witness enquired particularly into the transactions, because he knew King would take advantage of it, if he could. The witness had the note once or twice in his possession before it was indorsed to him. When it was indorsed to him he paid the money for it, but does not recollect how much. The note was received for money lent to Brown, for which no premium was retained. When the note was delivered to the witness, he loaned Brown \$500, and upon this sum being returned with an interest upon it exceeding 7 per cent. per annum; the witness agreed to restore the note to Brown. When Brown died, he owed the witness from \$1200 to 1500; the witness had various money transactions with Brown, and they were all upon a promise of Brown to pay to the witness an interest exceeding 7 per cent. per annum. The note was indorsed to the plaintiff long before it was due, at least 80 days previously. The witness lodged the note in the bank for collection, as a broker, as is frequently done, but merely as the agent of the plaintiff whose property it was exclusively. The witness received bank stock in payment for this note from Dr. Johnson, the plaintiff's agent. Dr. Johnson was ignorant of any usury in the transaction. The witness believed he allowed upon the transfer of stock to him something above the market price, but this

was only the customary difference between the cash and a note which had some time to run. The business of James C. Brown was carried on by his father, Joshua Brown ; but Joshua Brown, did not indorse his son's note. King acknowledged to the witness that he had given this note for money received by him from Brown. He never objected to pay the note during the life-time of Brown, but did after his death.

The counsel for the defendants produced the other bond given for duties by Brown and King, and also King's account, as assignee of Brown, to shew, that only one bond had been charged to J C. Brown, and to prove that a balance of upwards of \$1,100 were due to him as assignee.

The plaintiff's counsel contended that as the note was a fair negotiable note in its origin, and given for a valuable consideration, no subsequent act could vitiate it in the hands of an innocent indorsee, and if there was any usury in the transaction, it was confined to Brown, by which the plaintiff could not be affected. He quoted 1 *Comm: on Con'ts* 40. 3 *Johns. cases*, 206. 1 *Bay* 479. 15 *Johns. R.* 44 & 55. 15th *Mass. T. R.* 272. & *Ord on Usury* 110.

His Honor after recapitulating the testimony and stating the law which seemed to him to be applicable to the case, charged the jury, that in his opinion, the defence of usury had been fully made out.

The jury found a verdict for the plaintiff.

The defendant now appealed on the grounds :

1st That the note declared on was not obligatory or binding, but was inceptive merely until James C. Brown put his name on it and delivered it to O'Hara for an usurious consideration, and for this reason the note was usurious in its formation and commencement, and, therefore, void.

2nd. If the note be not void, then was it contended that the endorsement was void, and the plaintiff had no right to sue. For which reasons, it was submitted, the court would either grant a new trial, or nonsuit the plaintiff.

JOHNSON, J.—1st. The conclusion that the note was only inceptive, until endorsed by the payee James C. Brown, which is made the foundation of the first ground of the motion does not appear to the court to be warranted by the evidence. The consideration on which it was founded, (the money placed in defendant's hands) was adequate, and whatever equities might have arisen as between themselves, out of the contract to deliver it up on defendants paying one of the bonds, the note was transferred before it came to maturity, and it follows as a legal consequence, that the plaintiff, an indorsee without notice, is entitled to recover, unless indeed it is contaminated by the supposed corrupt agreement on which it was transferred by Joshua Brown to O'Hara.

2nd. About the facts which relate to this matter, there is no difficulty. The note was endorsed in blank by the payee James C. Brown, and in that situation, it was transferred by Joshua Brown to O'Hara, and by him to the plaintiff, both without further endorsement. The sum paid by O'Hara, in consideration of the transfer to him, did not equal the nominal value of the note by an amount far exceeding the legal rate of interest for the time which it had to run; and it is now contended in support of the second ground of the motion, that this contract was against the statute of usury, and therefore void; and, hence, it is concluded, that the plaintiff having derived her interest from this corrupted source is not entitled to maintain her action. Courts of justice have universally laboured to untrammel the restraints on the circulation of negotiable paper as indispensably necessary to the existence of commerce. They constitute, indeed, the mainspring, the very sinews of all commercial enterprise, and without them all its operations would be greatly impeded, if not wholly obstructed, and hence the great patronage which the law extends to them; and it may be safely laid down as a good general rule, that the innocent holder of a negotiable paper transferrable by delivery may maintain an action against the maker, however it may have been polluted by the

immediate hands, through which it passed ; as where one had obtained possession of it by fraud and circumvention, or even by theft, a *bona fide* holder without notice may maintain his action upon it.

There are, however, a few restraints imposed by positive regulations growing out of political experience, among which contracts founded on usurious considerations, which are by the statute declared to be void, are perhaps the most prominent; and it will not be controverted, that no contract based on such considerations will confer the right of action, either in the parties themselves, or others claiming under them. And in the application of this rule, it has been contended in support of the motion, that as the plaintiff claims through O'Hara, who was party to the alleged corrupt agreement, she cannot maintain this action. Let us however, examine the nature of this contract. It is the undertaking of the defendants to pay to James C. Brown or his order, and with his endorsement in blank it becomes in effect, according to well settled rules, a note payable to bearer. It is, therefore, substantially, an undertaking to pay to whomsoever shall be in the possession of it. And thus the relationship or privity necessary to sustain an action is established between the parties. This, therefore, must be regarded as a direct undertaking on the part of the defendants to the plaintiff.

The plaintiff declares as the indorsee of James C. Brown; and let us suppose that the defendant was put to plead the usury in bar; without following the technical language of such a plea it must substantially state, that the note was once in the hands of Joshua Brown, and that, in consideration of a certain corrupt and usurious agreement, he transferred it to O'Hara, both of whom are strangers to the record, and I think it would confound sophistry itself to establish by any deduction from principle, that, therefore, the plaintiff was not entitled to maintain her action. Such a conclusion would be as wide of right reason, as that because a

man moves and breathes as well as a horse, therefore, a man is a horse.

The opinion of Lord *Ellenborough* in the case of *Lowes and others vs. Mazarado and others*, 1 *Starke's Rep.* 385, has been relied on as conclusive in support of this ground. So far as the case itself is concerned, there is no disposition to find fault with the result; it is in strict accordance with well established principles, and which have been acted on by this court in the cases of *Payne and Smith*, *Fleming and Mulligan* and many others; for in that case the bill of exchange was drawn and indorsed by the payee and carried into the market to raise money, and having been discounted at an usurious rate of interest, it was corrupted in its creation and was therefore void, and it was still more and more polluted even by the transfer to the plaintiffs. But admitting all that is said in that case to be law, and his lordship was made to say that the indorsement was entirely avoided by the statute against usury, yet it is possible to distinguish this case from that. If Joshua Brown may be regarded as a stranger to the payee James C. Brown, and that may be fairly presumed in favour of the verdict, the plaintiff is under no necessity of tracing her right through either of the parties to the corrupt agreement; her claim, exhibited on the record is directly from the payee.

But I cannot reconcile such a doctrine with the well settled rule, that it is not usurious to sell or buy a negotiable paper founded on a legal consideration for less than its nominal value; and that such is the rule may be deduced without the aid of authority from the universal practice and consent of mankind. Bonds, notes, bills of exchange, bank notes, certificates of stock and even specie itself are the common subject of traffic, and their intrinsic value must always depend on such an infinite variety of circumstances, that no foresight or wisdom can regulate it. It is, therefore, I think wisely left to take care of itself, and I confess that after the most diligent effort, I have been unable to detect, in this case, a sin-

gle circumstance which distinguishes it from the ordinary case of selling a note for less than its nominal value. To declare that the parties to such traffic had incurred the pains of usury, would convulse the whole commercial world to its center.

Motion refused.

Petigru, attorney general, for the motion.

McCrary, contra.

JOSEPH S. SEABROOK, *ads.* MARK L. WILLIAMS, *Adm'r. of the estate of* RICHARD FREEMAN, *Sen.*

There is no privity between the administrator of an executor and the testator. An administration *de bonis non* must be taken out.

But an administrator may bring an action upon a bond given to his *intestate* as executor of a third person; more especially where the bond was given to the executor "his heirs, executors, administrators &c."

On the death of the testator, and *even before probate*, his personal estate is vested in the executor, who may maintain an action for any part of it, *even before probate.* (a)

Tried at Colleton, before Mr. justice Waties in November Term, 1826.

This was an action of debt on a bond, of the date of 28th February, 1805, payable to Richard Freeman, Sen. of John's Island, planter, executor of the estate of Jacob Rentz, deceased, conditioned for the payment of 3978 26.

The pleas were *non est factum* and *payment*.

The handwriting of the bond was admitted, where the plaintiff rested his case.

The defendant moved for a non-suit, on the grounds that the plaintiff being but an administrator of the estate of Richard Freeman, Sen. who was executor of the estate of Rentz, in the language of the law, it shall be taken to be a debt due to the testator, and after Freeman's death, was a part

(a) But it seems he cannot declare till probate. (*Salk.* 302. *Went.* 34.) R.

of Rentz's unadministered estate ; and furthermore that the plaintiff being the wrongful holder of the bond, payment to him could be no bar to an action brought by an administrator *de bonis non* or any surviving executor of Rentz.

The motion was overruled, and a verdict was found for the plaintiff.

The defendant now moved the court of appeals for leave to enter a non-suit, and in arrest of judgment, on the following grounds :

1st Because the bond in question belonged to the unadministered estate of Jacob Rentz, which was not legally represented by the present plaintiff, as administrator *de bonis non* of the estate of Richard Freeman, sen.

2nd. Because the plaintiff has sued as administrator of the estate of Richard Freeman, sen. otherwise called executor of the estate of Jacob Rentz, thereby taking upon himself to represent the first estate, which is against law.

JOHNSON, J.—The only question of law arising out of the motion is, whether the plaintiff can maintain an action on a bond given by the defendant to his intestate in the character of the executor of Jacob Rentz ?

It may be admitted, and such clearly is the law, that there is no privity between the administrator of an executor and the testator, and that to establish such a relationship between the testator and another an administrator *de bonis non* must be appointed, on whom alone devolves the personal rights of the testator ; but it may be a question of some nicety always to distinguish between those things which have been administered by the executor and those which survive to the administrator *de bonis non*, in the solution of which a resort to principles becomes necessary.

On the death of the testator, and even before probate, his personal estate is vested in the executor, although he may never have reduced it to possession : so that he may maintain trover or trespass for any part of it against him who has taken possession of them before probate (*Com. Dig. Tit. Ad-*

ministration. He may sell and dispose of the goods of his testator, or barter, exchange, or give them away, and, in fine, his dominion over them, is in law as absolute as over his own goods, and I apprehend any disposition by the executor of that which was the testator's, although it be the mere substitution of one thing for another, is, so far, an administration of the effects of his testator. The liability of the executor is not measured by the value of what he may have in his possession, as the representative of that which was his testator's; the law, therefore, properly regards the substitute or representative as his own and charges him with that which was the testator's. The bond on which this action is brought never was the property of the testator or the plaintiff's intestate; at best it is only the representative of what might have been his, but has been disposed of by his executor, which, according to the principle, has been administered, so that nothing would survive to an administrator *de bonis non*; if such a person was claiming.

This view of the subject is strengthened by another consideration. A court of law, for want of jurisdiction over the subject, cannot know that the executor has not fully administered all the assets of the testator and accounted with those entitled to the last cent; and in that case, although he might have retained possession, of that which had been his testator's, yet when he had discharged all the obligations which that relationship imposed, his representative rights would be merged in his personal rights.

Independent of this principle, however, there is another on which this action may be sustained. The law in its great liberality permits persons to make the law of their own contracts, provided it imposes nothing contrary to positive injunctions, or offensive to morality. This bond is in the usual form, and is an undertaking to pay to the plaintiff's intestate as executor of Rents, "his heirs, executors, administrators and assigns," the sum mentioned in it. It is a part, therefore, of the law of the contract that the defendant will pay to the ad-

ministrator of plaintiff's intestate, which the defendant has broken; consequently the plaintiff is entitled to his action.

Motion refused.

Clarke, for the motion.

Ford & DeSaussure, contra.

ELIZABETH HAYNE vs. F. A. DELIESSELINE, City Sheriff.

A bond held by an inhabitant of the city of Charleston is subject to taxation, though the obligor resides out of Charleston.

Motion for a prohibition before Mr. justice Bay, who made the following report :

"The object of the present motion is for a writ of a prohibition to restrain the city sheriff, F. A. DeLiesseline from levying a tax upon the relator on a bond held by her for \$1400, imposed by an ordinance of the city council of Charleston.

Mr. *Holmes*, in support of the motion, stated that although the relator resided within the city of Charleston, yet the obligor of the bond Mr. James King, Sen. resided out of the limits of the city, to wit, in St. Paul's Parish, and that it was given for property formerly belonging to her within the same parish; admitting, however, that the income of the said bond was spent within the limits of the city, as might appear by the suggestion filed in this case. He next stated that it was contended that the city ordinance for 1824, embraced or made liable to taxation all bonds whether representing property in the country or city; whether the bonds themselves were in the city or country, or whether the obligor or debtor resided in the country or city: Provided the income was enjoyed or spent within the limits of the city; which he contended was not warranted by the terms of the ordinance itself, the city charter or the laws of the land, therefore he prayed for the writ of prohibition.

Mr. Drayton, the city recorder, argued for the city and contended, that as the relator was an inhabitant of the city of Charleston, she was subject to the city ordinances as well as any property she might have within the limits of the city. That bonds at interest owned by a person resident in Charleston had been considered as property, (as in *Ravenel's case*, 1 *Cons. Rep.* 36,) and, therefore, the subjects of taxation. That an obligee or owner of a bond might sell, assign, or transfer over a bond in the same manner as lands and negroes are sold or transferred, and the holder would thereby become the absolute owner and proprietor of such bond and all monies, principal and interest, secured thereby in the same manner as if land or negroes were sold. That the city council by the fourth clause of their charter are empowered to make and levy such assessments on the inhabitants of Charleston, or those who hold taxable property within the same, for the safety, convenience, benefit and advantage of the city as should appear to them expedient. This clause of the charter then, the recorder contended, gave the power to the city council of taxing the inhabitants of the city or their incomes, or their property as they thought most expedient. And the city ordinance for raising the supplies for the year 1824, was in exact accordance with the powers given by the above 4th clause of the city charter; for it declares among other things that all personal property consisting of bonds, notes, insurance stock, six and seven per cent stock of the United States or other obligations, &c. shall pay a tax of fifty cents on every hundred dollars, &c. It then proceeds to tax stock in trade, profits or incomes, and the other subjects of taxation, &c. mentioned in the ordinance."

BAY, J.—Who heard the motion, said the whole of the arguments might be condensed within a very narrow compass, and the great question then would be, whether a bond held by an inhabitant of the city of Charleston, where the obligor resided beyond the boundary-street was subject to taxation or

not? And the solution of the question appeared to him to be so plain and obvious in itself, that it was hard to conceive how a difficulty could have arisen upon the subject; for in his opinion, it was totally immaterial from what quarter the funds were to come to pay the bonds held by an inhabitant of the city. The only point for the consideration of the city council was the amount of the funds actually possessed by the citizen or inhabitant, come from what quarter of the world they might, and then to fix the per centage on that amount. It was the quantum possessed, they had in view, and not the mode or manner in which the money was raised, or in what place, or on what contract it originated. It was quite enough for them to be satisfied that the relator lived within the limits of the city and enjoyed all the privileges and advantages of the city institutions, and was in possession of the funds subject to taxation. The clause in the city charter relied upon by the recorder was clear and express upon the subject, and the city ordinance appeared to him to have been made in conformity to the powers given in the charter; and there was not an article in the constitution that he could discover, or any law of the land, against it. He was therefore, of opinion, that the motion should be refused, and the suggestion should be dismissed.

From this opinion the plaintiff appealed.

Norr, J.—This court concur in opinion with the presiding judge below.

Motion refused.

Holmes, for the motion.

The *Recorder*, contra.

The Bank of the State of South Carolina, vs. ROBERT R. GIBBS, Executor of PETER SMITH.

A debt due to the Bank of the State of South Carolina, is not a debt due to the public, and can claim no priority on that ground

The Bank, though owned entirely by the State, is a mere corporation, possessing the same powers and privileges of other corporations.

The question in this case was, whether a simple contract debt due to *the Bank of the State of South Carolina*, was a debt due to the public, within the provisions of the executor's act, (*Pub. Laws*, 494,) and as such entitled to a preference, as a public debt

NORT, J.—The act of the legislature, upon the construction of which the decision of this case depends, directing the order in which the debts due by a testator or intestate shall be paid, provides, “that the funeral and other expenses of the last sickness, charges of probate of the will, or of letters of administration, shall be first paid; next debts due to the public, &c.”

The question now is, whether the debt in this case is in the sense of the act a debt due to the public? There is nothing on the face of the proceedings which will authorize us to view it in that light, for we must look beyond the case itself to see that the state has any interest in it. It is not then a debt due to the public; but it is due to the corporation, though the money when received may be for the use of the state. In the case of the United States' Bank, against the Planters' Bank of Georgia, (*9th Wheaton*, 907,) Chief justice *Marshall*, who delivered the opinion of the court, said, “the suit is against a corporation, and the judgment is to be satisfied by the property of the corporation, and not by that of the corporators. The state does not, by becoming a corporator, identify itself with the corporation. The Planters' Bank of Georgia, is not the State of Georgia, although the state holds an interest in it.” “It is,” he says, “a sound principle, that when a government becomes a partner in a

trading company, it divests itself so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen." I cannot distinguish that case from the one now under consideration. It is true the state of Georgia held but a part of the interest in that bank, and the State of South Carolina owns the whole in this. But nevertheless, we may with truth say, in the language of that opinion, the Bank of the State of South Carolina, is not the State of South Carolina; it is only a corporation created for particular purposes, possessing the same powers and privileges of other corporations, and no more. The state did not transfer any portion of its sovereignty to this corporation, nor communicate to it any of its privileges or prerogatives, but has placed it on the same level with other corporate bodies, with the same privilege of suing, and liability of being sued, as an incident to such corporations. I am of opinion, therefore, that the same principle by which the case referred to was governed, is applicable to this case, and that the bank is not entitled to any such preference as is contended for—and that is the opinion of the court.

The motion is, therefore, refused.

Grimke for the motion.

Gibbs and *King* contra.

JOHN H. MARGART, vs. THOMAS B. SWIFT.

Notice by the landlord to the sheriff, before the whole of the goods are removed off the premises is in time, under the statute of 8 Anne, c. 17, to entitle the landlord to demand of the sheriff one years rent; or should the goods sell for less than one years rent, then for as much as they produce, after paying the sheriff such costs as were incurred before notice given him of the rent due, and after all just allowances.

Tried before the Recorder in October term, 1825.

This was a process for \$22 50 in the nature of case, by a landlord, against the defendant as a constable, for executing a *fieri facias*, and removing goods off the premises before the landlord was paid his rent due, pursuant to the statute 8 Anne c. 17, of force in this state. The first witness call-

ed, was Mrs. O'Callagan who testified that the defendant came to her house on the 11th April 1823, with an execution as he said. He took every thing in the house, beds, bedding &c. and left nothing but the walls; that witness was the tenant of the plaintiff, and owed three months rent on the 13th March preceeding. The fourth month would have been up the 13th. She told defendant that she owed rent, and he said he did not care: (a) she asked for a schedule of the property, and he said he would not give it. Even her children were deprived of their bed, and her husband was absent. The defendant came there a week before, but did not carry any thing away then, but took an inventory of the contents of the room in which he sat. The rent was \$7½ per month. Defendant said he would sell the things if it cost him \$1,000 and this was after Mr. Gadsden had cautioned him against doing so. Witness told him how much was due, and Mrs Pennington, the plaintiff's aunt and agent told him too. Mrs. Pennington said there would be \$30 due the plaintiff on the day after that; witness hired the house of Mrs Pennington, and paid the rent to the plaintiff

Mrs. Pennington's testimony was then read; and she gave the defendant notice of 4 months rent being due, and told him, if he would pay the rent, he should have the goods. He refused and carried away the goods. Witness gave him notice of rent being in arrear a fortnight before he made the levy, and again when he made it. The residence of the defendant in the city and his having a regular execution from a magistrate, under which he levied, was admitted.

Moses P Belknap was called by defendant. He testified that the defendant in March or April called on him to accompany him to Blackbird Alley to make a levy; that he levied on the furniture of O'Callagan, but they found a prior levy then, and did not remove the goods. About two weeks after that, witness was again called on to accompany defendant to the same place, and, he, defendant, levied on the

(a) See ante 39 note (a.)

things. It was on the 11th or 12th April, he thought the 11th. They were carried away and placed in the store of witness for one night, who had a distress warrant, taken out by plaintiff, issued against them; that Mrs. Pennington was present at the levy and told Swift whilst he was removing the things not to do so as rent was due the plaintiff; the goods were on a cart in the street at the time, except two articles which still remained in the yard. Mrs. Pennington said, there were three months due, and in a day or two, there would be four months rent due. The distress warrant which was produced, was given to witness by justice Chitty on the 12th April, and after the goods had been removed. They were not taken under the warrant, because the plaintiff gave an order dated 12th March which was attached to the warrant giving the bailiff leave to deliver the goods, seized under the same, up to O'Callagan. The witness was proceeding to seize the goods in company with the defendant, when they met Mrs. O'Callagan with the order, and then witness turned back without seizing the goods under the warrant. After that, defendant had them sold by witness and defendant kept the account of the sales. The witness did not recollect what the goods were sold for, but on a memorandum being handed to him in defendant's hand-writing, he said he believed it to be correct, and that the whole sales did not exceed \$15; and to the best of his recollection were \$12 6½. That defendant was perfectly willing to give up the goods till the order of plaintiff in Mrs. O'Callagan's favour was produced.

Mr. Gadsden testified that he told the defendant not to sell the property, and he said he would sell it. Witness advised the taking out the distress warrant, and plaintiff gave the order spoken of, and which is attached to it, that they might be restored to the woman and not sold. The goods were not distrained on under the warrant. The case here closed.

Mr. Rice for defendant contended, 1st. that the goods were actually removed before the notice of the rent was given, which under the statute was fatal to plaintiff's recovery; that

even a bill of sale of a sheriff was held a sufficient removal, (*Woodfall* 467;) 2ndly That plaintiff had elected another remedy, viz. a distress warrant, and this discharged his claim or lien of the goods by the order in favour of Mrs. O'Callagan; and 3rdly, that if those grounds failed, defendant was only responsible for the actual amount the goods sold for, viz. \$12 6½ and not the three months rent, (*Woodfall* 469.)

These positions were denied by Mr. *Gadsden*; who contended that under the Statute, he was entitled to the whole rent due, provided it did not exceed one year's rent, without regard to the value of the goods, and the amount was given in nature of damages for the tort committed by the defendant in selling after notice from the landlord.

The Recorder was of opinion on the first ground taken by the defendant's attorney, that the notice having been given by the agent of the plaintiff before the whole of the goods were removed off the premises, was sufficient to satisfy the statute; that on the 2nd point, though the plaintiff actually procured a distress warrant, yet the officer did not execute it; the goods were not touched by him by virtue of it, but the defendant retained possession and proceeded with his sale, under the execution: consequently the warrant and the plaintiff's order founded upon the expected seizure of the goods under it were both nugatory and could not interfere with plaintiff's claim; that with respect to the 3d and last ground, he was of opinion, and so decreed that the defendant was responsible for the actual amount the goods sold for, viz. \$12 6½, and not for the whole rent due; that it did not appear to him that the statute meant that the sheriff should pay the rent to the landlord, whether the goods brought the amount or not, but merely that the landlord should stand as if no execution had issued, in which event he could have no more out of the goods than their value; that he thought this construction the only one which the statute was susceptible of, and that it had been so decided in the case of *Henchett vs. Kimpson*, 2 *Wilson*, 140, cited by Mr. *Lice*, from *Wood-*

fall, where the court, on motion to the sheriff to shew cause why he should not pay the landlord one year's rent under the statute. (the rent amounting to £30 and the sales of the goods to only £21.) ruled, that "the landlord under the statute should have the like benefit of distress for one year's rent as if there had been no execution at all, and was, on motion to the court, entitled to have restitution, to the amount of the goods the sheriff sold, which they directed the prothonotary to take an account of, and to allow the sheriff such costs as were incurred before notice given him of the rent due to the landlord, and after all just allowances, that the rest of the money should be paid by the sheriff to the landlord." He thought this settled the construction of the statute, as well as if the decision had been an action of case on the statute, instead of a motion: He therefore, decreed for the plaintiff \$12 6½

An appeal was made on the following grounds:

That the Recorder decreed that the plaintiff could only recover the price for which the goods sold; when under the statute and by the form of the action, the plaintiff, the landlord, was entitled to recover his rent of the defendant for the tort in selling the goods after notice.

NOTT, J.—The court concur with the recorder in the view which he took of this case below.

The motion is therefore refused. (a)

Gadsden, for the motion.

Rice, contra.

(a.) In *Andrews vs. Dixon*, 3. Barn and Ald. 645, it was decided that where the Sheriff with the knowledge that there is rent due to the landlord, proceeds to sell the tenant's goods by virtue of a writ of *fi. fa.* without retaining a years rent, he will be liable for it, although no specific notice has been given to him by the landlord. R.

THOMAS BUTLER, and THOMAS QUIN, *ad's.* THE STATE.

[At common law a receiver of stolen goods was not an accessory, but could only be punished as for a misdemeanor

But by the statute 3 and 4, Wm and Mary, c. 9, all receivers of stolen goods are made accessories after the fact.

An indictment need not state under which particular statute it is framed; it is sufficient to say *against the statute*, generally.

But if the indictment profess to recite the statute, a material variance will be fatal, or if the statute do not support the verdict, it must fail.

Tried before Mr. Justice James, May term, 1825.

The indictment was in common form against Butler at common law for grand larceny for stealing window sashes from a house of Condry & Wilson, then unoccupied, but watched by a servant who slept in the yard. There was a count in the same indictment against Quin for receiving the goods stolen contrary to the statute. The word theft in the fourth clause of the statute, and the title and preamble were relied upon. Butler was tried first, and found guilty. Quin was afterwards tried and it was proved by three witnesses, that the sashes were found secreted in a loft of defendant's house, and he confessed he had bought them for fifty cents a pair from Butler. An attempt was made to prove that the sashes were purchased by Quin's wife, while he was sick in bed. One witness stated that Quin was confined to his bed by rheumatism at that time for five or six weeks, but on his cross-examination, he said Quin told him he had bought the sashes and asked him if he did not think them cheap. A girl, E. Henderson, swore Quin was confined, as stated, by rheumatism, and that his wife bought the sashes; but on her cross-examination, and by other testimony, it appeared that the sashes could not have been conveyed to the loft without passing through Quin's chamber. There was but one staircase, and the passage to that, and the only one, was within a few feet of his bed.

An appeal was taken up for Quin, on the ground that the statute of *William and Mary* punishing receivers of stolen

goods, as accessories after the fact, only related to thefts committed upon the *person*.

COLCOCK, J.—At the common law a receiver of stolen goods was not an accessory; he was punished only as for a misdemeanor, by fine and imprisonment. (*1st Chitty, Crim. Law*, 266. But it was soon discovered that the punishment was inadequate: hence the clause in the statute 3d and 4th Wm. and Mary c. 9, making receivers accessories in the following words, "For as much as thieves and robbers are much encouraged to commit such offences, because a great number of persons make it their trade and business to deal in the buying of stolen goods. *Be it therefore enacted*, That if any person or persons shall buy or receive any goods or chattels that shall be feloniously *taken or stolen from any other person*, knowing the same to be stolen, he or they shall be taken and deemed an accessory or accessories to such felony, after the fact, and shall incur the same punishment as an accessory or accessories to the felony, after the felony committed," (*Pub. Laws* 86) But it was contended, that as the act speaks of a particular description of felonies, this clause can be construed to relate to none others; that it was only intended to make the receivers in the particular felonies mentioned by the act accessories, and in support of this construction, the word "such," in the preamble to the 4th clause was relied on, having it was contended, reference to the felonies mentioned in the first clause of the statute: But is this in opposition to all the rules of construction, as well as to the general terms of the clause and the title of the act. The word "such" must refer to the words, "thieves and robbers," by the rules of grammatical construction; and when taken in connection with the words "any goods and chattels," put it beyond all doubt, that all receivers of stolen goods should be considered as accessories after the fact, and this has been the uniform construction given to this clause. It was said, that on the trial the counsel were referred to the statute of Anne, as the one under which the defendant was indicted, and that

therefore the indictment must stand or fall under that statute. But the indictment concludes in general terms "against the statute," without saying what statute: Now it has been perfectly settled that there is no necessity in any indictment or information on any public statute, whether the offence be evil in its own nature, or only becomes so by the prohibition of the legislature, to recite the statute upon which it is founded; for the judges are bound, *ex-officio*, to take notice of all public acts. Where there are more than one by which the proceeding can be maintained, they will refer it to that which is most for public advantage: But if the indictment profess to recite the statute, a material variance will be fatal, or if the statute does not support the verdict, it must fail (*1st Chitty, Crim. Law. 277.*) As to the facts, they have been fairly submitted to the jury, and the court cannot say that their verdict is without, or against, evidence.

The motion is, therefore, dismissed.

J. B. White, for the appellants.

Petigru, Attorney general, contra.

E. POHL & SON vs. EDWARD LYNAB, same vs. JAMES LYNAB.

Under the 7th clause of the insolvent debtors act, requiring certain creditors to come into court and prove their claims, a judgment creditor is not included.

The act is confined to "conveyances, bills of sale, assignments and mortgages."

Tried before Mr. justice Bay, in October Term, 1825, who made the following report, containing the opinion he delivered below.

"The seventh clause of the insolvent debtors' act enacts, that "in case any debtor at any time before being taken into custody, shall have made any conveyance, bill, or assignment, of any lands, tenements, goods, or chattels whatever to any person or persons whatever, all and every such

person or persons to such mortgage, bill of sale, assignment, or other conveyance, that is, or shall be made as aforesaid, or if his or their attorney, agent, executors or administrators shall not appear before the said court, at the time appointed for the creditors to appear, or in case of sickness or other lawful impediment shall fail to transmit an affidavit and attested account as is directed, and then and there make oath, that such mortgage, bill of sale, assignment or other conveyance was made to the best of their knowledge and belief for a valuable consideration actually paid; or that such judgment was for a debt *bona fide* due, then every such person or persons his or their attorney, agents, executors and administrators shall be deemed to have taken it from the petitioner upon a false or feigned trust, with intention to defraud the creditors of said petitioner:" "and every such mortgage, bill of sale, judgment, assignment, or conveyance shall be and are hereby declared null and void to all intents and purposes." Now it is very evident, that in the former part of the enacting clause of this act, judgments are not mentioned; it is confined to conveyances, bills of sale, assignments and mortgages, and although judgments are mentioned in the subsequent part of the clause, yet they are clearly words of reference only, and as there is no antecedent document mentioned to support such reference, there is no rule of construction, that can justify the court in extending it to a class of securities not mentioned among those specifically and particularly enumerated. It is true, that from the latter part of this clause there is some room to conjecture that judgments were intended to be included as well as conveyances and bills of sale &c. but as they are entirely omitted, it appears to have been a *casus omissus* in the act, which nothing but the legislature can supply. Defects of this nature cannot be cured by the construction of courts of justice; they must depend upon the legislature alone; and what confirms this opinion is, that, in no instance since the 1759, when the insolvent debtors act was passed, to the present day, have the courts of

common pleas in this State, ever allowed of judgments to come in and be allowed to be proved with mortgages and other conveyances; a strong presumption that the courts of justice never considered them as included in this clause of the act: For these reasons, I refused the plaintiff in this case, and all the other judgment creditors, the liberty of proving their judgments, as I did not consider them as coming under the terms of the act; and I was the rather induced to refuse these motions as it has been determined in the constitutional court that judgments retain their liens on the estate and effects of insolvent debtors according to their seniority, so that no injury was done to the plaintiffs by leaving them in the situation where the law had placed them."

NOTT, J.—The court in this case, concur with the presiding judge in opinion, and the motion is therefore refused.

Pepoon, for the motion.

Petigru, attorney general, contra.

JOHN STONEY, vs. THE UNION INSURANCE COMPANY.

Where the assured undertake to state all the circumstances which can affect the risk, they must do so fully and faithfully. The rule admits of no exceptions. It cannot be said after a loss has taken place, *that the insurers knew the fact*, and therefore it was not communicated.

So, on a policy "at and from Charleston to Marseilles," the fact that the vessel had been laden at Havana, and only touched at Charleston, not having been mentioned in the offer, was held to avoid the policy, although the underwriters may have known the fact. Havana being a belligerent port, and the danger increased thereby. *Nott, J. dissenting.*

This was an action on a policy of insurance, tried before Mr. justice Huger at Charleston. Verdict for the plaintiff.

A motion was made in the appeal court to enter up a nonsuit, or for a new trial upon the following grounds:

1st. Because the voyage, insured, being, by the policy, an original voyage, "at and from Charleston," and the voyage

sailed on being one from Havana to Marseilles, touching at Charleston, the risk insured never attached.

2nd. Because, if the policy could be extended to the voyage sailed on, there was a concealment of the material fact, that the vessel was loaded at Havana, a belligerent port; and the offer being silent on the subject, though professing to disclose all material things, proved a misrepresentation on the part of the insured, which the constitutional court had already decided to be fatal to the insurance.

3rd. Because the presiding judge charged the jury that they had the privilege of judging, from the newspapers and other evidence, whether the company had a knowledge of the facts of the voyage having commenced at Havana and of the cargo being laden there; and that if they knew it, no disclosure to them was necessary: whereas it is contended that the decision of the constitutional court has settled that the insurer is not to be affected by a presumptive knowledge of any private thing not contained in the offer, which offer cannot be altered by parol or presumptive testimony.

4th. Because the presiding judge told the jury they might judge of the fact and find if they pleased that the concealment was immaterial, notwithstanding the constitutional court had already decided that it was material in this very case, and had set aside the former verdict on that very ground.

COLCOCK, J.—This is the second time this case has been before us. (*Harper's L. R.* 235.) I shall express no opinion on any of the grounds but the third; on which a new trial must be granted. On this ground a new trial was formerly granted, and there has been no new evidence given to vary the case. Where the assured undertake to state all the circumstances which can affect the risk, they must do so fully and faithfully. The rule admits of no exceptions. It cannot be an excuse to say (when a loss has taken place) that the insurers knew such a fact, and, therefore, it was not communicated. It is asked, why tell a man what he already knows? The answer is very plain and forceable, because you have

expressly undertaken to do so; and from the nature of the contract, and the relative situation of the parties, it is necessary that you should do so. The case illustrates the usefulness and propriety of the rule. It is said the underwriters knew that this vessel had come from the Havana, and had been loaded there. Now let it be conceded for a moment that they did know it—they also knew that her cargo might have been discharged here and reshipped, and that then this would have been the port of departure, and the sailing from hence, the commencement of the voyage, and have brought the case within the language and meaning of the offer. Here it is urged that if it be admitted that the underwriters knew the fact of the arrival of the vessel from the Havana, and her having been loaded there, that then they should have enquired as to the other facts. But it must be perceived that this is at once destroying the effect of the rule, and imposing on the underwriters a duty which the insured, by the contract, had undertaken to perform. The law on this point is well established, and after what has been said in the former opinion delivered in this case, it is not deemed necessary to add any further observations. The verdict is a violation of the law in this most important provision and strikes at the very foundation of the contract of insurance. It has been suggested that the jury may have thought the fact not material, but it cannot be believed that any twelve impartial men possessed of ordinary understanding can think it was unimportant, that this vessel had shipped her cargo at a Spanish port, when it was incontrovertibly proved that the Spanish Patriot vessels were cruising in the Mediterranean and actually capturing Spanish vessels and goods at that time. And in addition to this, there was an expression of an opinion by every witness conversant with mercantile affairs, that it was an important fact and did increase the risk.

The motion is, therefore granted.

Not J. dissenting.—This was an action on a policy of insurance on the ship John "at and from Charleston to Mar

seilles, and from thence to Havanna, for this present voyage; beginning the adventure upon the said vessel as aforesaid, and so shall continue and endure during the voyage aforesaid, &c. safe at Charleston, intended to sail in about three days, &c. dated, Charleston August, 1818." A policy was effected the same day between the same parties on goods, (sugar and logwood,) "at and from Charleston to Marseilles, beginning the adventure upon the said lawful goods and merchandize from and immediately following the boarding thereof on board the said vessel at Charleston aforesaid, &c," The vessel arrived safe at Marseilles, but was lost on her return voyage to Havana. It appeared in evidence that the vessel had actually cleared out at Havana for Marseilles previous to the insurance and had merely touched at Charleston for orders, but had not entered nor cleared out from that port. The jury found a verdict for the plaintiff and this was a motion for a new trial or for a nonsuit on the following grounds. (Here his honor repeated the grounds heretofore stated.)

A policy of insurance like every other instrument of writing must be construed according to the natural and obvious meaning and import of the words. The words of this policy imply that the vessel was at the time of insurance at Charleston. It cannot be inferred from the face of the policy that the voyage was to commence, or that the cargo was to be taken in there, but merely that the adventure was to commence at that place. The vessel was there at the time, and the warranty therefore was true. In *Kimble vs. Brown*, 1 *Caines*, 80. it is said, if a ship be at the place in safety at the time the policy was subscribed, it cannot be material where she was prior to that day. That is precisely the case here. The vessel was at Charleston in safety at the time the adventure or the risk commenced, and, therefore, it could not be material where she was before. In the case of *Hull vs. Cooper*, 14 *East*, 479, it was held that a policy at and from a particular place did not even imply that she was there at the

time, but that she would shortly be there, and that her not being there was not such a deception as would vacate the policy, unless the risk was thereby increased, which was a question of fact for the jury. The case of *Spitta vs. Woodmas*, appears to be very obscurely reported. The ground of discussion is not distinctly stated in the opinion of the court. But enough can be collected from it to satisfy us that the discussion can have no influence on this case. The action appears to have been on two policies on the ship *Daniel and Frederick*; "at and from Gottenburgh," on specific goods, &c. beginning the adventure on the said goods from the loading thereof on board the said ship, (not saying where.) The goods had been put on board at London before the first of April, 1808. The declaration averred that on the 8th May following, the ship in the policy mentioned with the goods on board thereof as aforesaid was in good safety at Gottenburgh. The exception taken was that the words "at and from Gottenburgh, beginning the adventure on the said ship," must mean on board the said ship at Gottenburgh, as no other place was mentioned. If that were the true construction of the policy, then it could never have attached, because the event never occurred, as no goods were laden at Gottenburgh. If that were not the true construction of the policy and it was the intention to aver that the goods were laden at Gottenburgh, then the proof did not support the declaration. It does not appear from the decision upon which ground the judgment of the court was founded: but it is apparent that the motion must have succeeded upon one or the other. No such objection arises in this case, because the vessel was at Charleston as the policy states and the declaration avers. The case of *Robertson & Thompson vs. French* (4 East. 130,) turned upon the words of the policy. In that case the insurance was upon both the vessel and goods, "beginning the adventure upon the said goods from the loading thereof on board the said ship &c. on the coast of Brazil" and upon the ship &c. in the same manner. It appeared in

evidence that the goods had been shipped at the cape of Good Hope and not on the coast of Brazil. The plaintiff obtained a verdict and a rule was obtained for setting aside the verdict and entering a nonsuit on two objections. The second is the only one which is necessary to notice; which was, that the policy never attached, the adventure on the cargo being by the terms of the policy made to commence "from the loading of the goods, on board the ship on the coast of Brazil," an event which never happened, in as much as the goods were not loaded there, but at the cape of Good Hope; and that as the adventure on the ship was by the terms of the policy made to commence "in the same manner," with that on the goods it could, of course, have no commencement if that on the goods never attached. The objection was sustained on the ground "that the adventure could only attach on goods and ship, after loading of goods had taken place on the coast of Brazil." The case of *Langhorn vs. Hardy* (4 Taunton 628,) dependent upon the same principle. The case now under consideration is upon a separate policy on the ship alone, not at all depending upon the terms of the policy on the goods. If this policy had contained the words, "from and immediately after the loading of the said goods on board the said vessel at Charleston," it would have come within the cases of *Robertson & Thompson vs. French*, and *Langhorn & Hardy*; but containing no such provision it must be construed without any reference to the policy on the goods. The case of *Hormyer vs. Lushington* (15 East 46) is a stronger case than this. In that case, a single policy was affected on both goods and ship; (not a separate policy on each) at and from Gottenburgh to Riga, beginning the adventure on the goods from the loading thereof on board the said ship at Gottenburgh. It appeared that the goods were laden on board the ship in the port of London. It was held that the policy on the goods never attached, and a proportional return of the premium was allowed. The principle settled in all the cases is this: That were the being there

adventure to commence after the loading of the goods at any particular place and it shall appear that they had been previously laden at some other port, the policy cannot attach, because the event has not occurred. And if the policy on the vessel depends upon the same event, it will receive the same construction. But when it has relation to the goods alone, it cannot affect the policy on the ship. (See *Richards vs. the Marine Insurance Co.* 3 *Johnston's Rep.* 307. *Graves & Scriba vs. the same*, 2 *Caines* 338.) Goods may be damaged between the port where they are laden, and the port at and from which the risk is to commence; any other construction, therefore, would subject the underwriters to loss not covered by the policy. And if that is the construction where ship and goods are both embraced in the same policy, how much more strongly will the rule apply where there are separate policies on the ship and goods, and the particular clause which gives construction to the contract upon the goods, is omitted in that upon the ship? I do not find any case where the words at and from have been held to imply the commencement of the voyage. I am of opinion, therefore, that there was no breach of warranty in this case.

With regard to the second point, it was my opinion that the fact of the voyage having commenced at Havana, and the ship was now about to sail with the original cargo on board, were material facts which might have increased the risk, and ought, therefore, to have been disclosed at the time the offer was made; and it was upon that ground that I thought a new trial ought to be granted, on a former motion; but it all depended upon the fact, whether the risk was thereby incurred; and that was a question for the consideration of the jury. (*Hull vs. Cooper* 14 *East* 479.) And although I still think the testimony very strong on that point, yet as there have been two concurrent verdicts in favour of the plaintiff I do not think that we ought again to interfere.

But whether material or not, if all the facts were known to the underwriters, it would not affect the policy. And

whether their knowledge was derived from the insured or from any other person was not material: It is not necessary to disclose what the insurers may have learned from any other source. (*Phillips* 104. 1 *Caines* 489.) And whether they were acquainted with the facts or not, was a question for the jury. There was no error, therefore in the charge of the judge on that point.

On the last point, I have already expressed my opinion. It was a question of fact for the jury and was very properly left to their consideration. I would also further observe that this court can never form as correct an opinion of evidence as the judge who receives it immediately from the lips of the witnesses. And the presiding judge expresses himself perfectly satisfied with the verdict in this case.

Prioleau and Toomer, for the motion.

Hunt and Memminger, contra.

LEMON GALPIN vs. BENJAMIN F. HARD.

The necessity of a personal demand upon the drawer, to render the indorser liable, is superseded in a variety of instances, which would impose on the holder an unreasonable degree of labour and inconvenience.

So it seems, that if the holder cannot discover which place the drawer has removed it is sufficient to excuse him from giving notice to the drawer; or where the drawer has absconded, or removed into a distant country.

And where the drawer of a bill of exchange or maker of a promissory note has removed from the place where the bill or note represents him to reside, or where he did reside at the time the bill was drawn or note made, the holder is bound to use every reasonable endeavor to find out whither he has removed and, if he succeed, he must present it for payment, to charge the indorser.

The case of *Wilmore vs. Young*, said not to be law.

A demand upon the drawer, and notice of non-payment must be given to the indorser upon a note payable to bearer in the same manner as in case of notes payable to order.

A note being dated at a particular place does not render it payable at that place alone; and if enquiry be made for the drawer at such place, and he cannot be found, the holder is not thereby excused from enquiring elsewhere.

Tried before the recorder of the city of Charleston, who made the following report:

This was an action on C. Fishburn's note, dated Charleston, April 1821, indorsed by the defendant. The note was payable to B. F. Hard or bearer. Knox the notary who protested it, proved that when it became due, he tried to find the drawer in Charleston, but could not; that he called on the defendant and told him he could not find the drawer; witness asked him, if he knew where he was, and defendant said no. Witness then demanded payment of him, and he replied that witness must first look to the drawer. The defendant then said that Fishburn (the drawer) was in the country; and witness gave him a notice for Fishburn, to be sent by defendant to him. This was on the last day of grace. Defendant said, some one was going into the country or Fishburn's servant would be in town; witness said, you can then send the notice to him, and, he said, yes.

Elliott swore he knew Fishburn intimately; that he was in Charleston in 1819 and 1820; and witness supposed he was there in the winter of 1821, as it was his habit to spend all his winters in town. According to the witness's best recollection, he was then in town; he was a student of law in Charleston at the time. He believed, at that time, he was not engaged in planting; he was now dead; he called himself an inhabitant of St. Bartholomew's Parish; witness tho't he resided in the city in April 1821; witness lived by himself then, and Fishburn often visited him.

Wilson was next examined. He testified that Fishburn in 1820, resided at the Round O. His summer residence was at Island creek; that he resided in Charleston in the summer of 1821. It was after the month of May that witness saw him in Charleston. He also saw him there before April 1821, and during that winter, but did not know if he was a visitor or resident at that time. He resided in Charleston in the summer, but in the previous winter thought he was but a visitor. The drawers and second endorsers' signatures were then proved.

Mr. *Cruger* for defendant then moved for a nonsuit, which being refused, the grounds of the motion were used in the defence before the jury. He insisted that no demand was proved to have been made on the drawer; and secondly, that the cause of action did not arise within the city, the drawer being found to be a resident of the country.

Mr. *Clarke* for the plaintiff combatted these grounds and insisted that it was proved the contract was made where it was dated; viz: in the city and that the drawer resided there, at the time, though he afterwards could not be found there, when the note became due. That no demand on the maker of a note, or acceptor of a bill is necessary, when he cannot be found, as was the case in this instance. He cited 1 *Cons. Rep.* 367. 4 *Mass. R.* 44. *Mass.* 44. 2 *Caines* 121. 20 *Johnson* 168. *Buller, N.P.* 273 He further contended that as this note was payable to bearer and not to order, the indorsement was like a new note by defendant which rendered any demand on any other than himself nugatory.

The Recorder told the jury that he thought the case was entirely for them and not for him to decide. But upon the last point taken by the plaintiff's attorney, his opinion was that the defendant was not to be regarded as an ordinary indorser of a note in which a demand on the maker would have to be proved; but rather as a new drawer of the note, his name being written on the back of a note, not payable to order, but to bearer and if he were a drawer, then no demand on any but himself was necessary. That as his hand writing was proved, he thought the plaintiff entitled to a verdict.

The jury found for the plaintiff and the defendant appealed on the grounds:

1st. That no demand was proved on the drawer, or at his residence.

2nd: That the court charged, that no demand on the drawer is necessary where the note is payable to bearer, for the purpose of subjecting the indorser to liability.

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JOHNSON J.—The first ground of this motion embraces a proposition which, as a general rule, cannot be controverted, that the ^{indorser} ~~indorser~~ of a promissory note must demand payment of the drawer, before he can charge the indorser. This rule, it is true admits of numerous qualifications, or rather supercedes the necessity of a personal demand in a variety of instances which would impose on the holder an unreasonable degree of labour and inconvenience; and it has been contended in opposition to this motion, that where the drawer has left the place at which he resided at the time the note was drawn, the case falls within this class of exceptions and that the holder is not bound to enquire further after him. And in support of this position, the cases of *Stewart vs. executors Eden*, 2 *Caines* 121, and *Ogden et al. vs. Cowley*, 2 *Johnson* 275, have been relied on. In the first of these cases, the drawer had a house on Long Island; and a store in New York, at the latter of which the presentment was made and payment was demanded of his clerks, who answered that he had gone into the country and had left no instructions. In the latter case, the notary called at the house of the drawer, in the city of New York, which he found shut up, and was informed that he also had gone into the country. It is impossible to reconcile these cases to the general doctrine on the subject without supposing that they proceeded on the ground that the drawers had not changed their residence, or that the holders were unable to discover to what places they had removed; either of which would have dispensed with a personal demand; and with this qualification they do not sustain the position contended for. In point of fact, however, it does not appear to me, that they are analogous to the case under consideration. Judging from the evidence, the strong probability is that Mr. Fishburn had no permanent residence in town. His residence here was the temporary residence of a student at law, and that only for the winter. He had no house, and his lodgings were probably changed as often as caprice or convenience required, and it does not appear that

enquiry was made either at his boarding house, or at the office where he studied. His permanent residence, if indeed he had any, was in St. Bartholomew's Parish, and all these circumstances are presumed to have been known to the plaintiff. If they were not, an enquiry of any one who knew any thing about him would have led to it; so that according to the view taken of the cases relied on, it does not fall within them. But I take it that it is a well settled rule that when the drawer of a bill of exchange, or the maker of a promissory note, has removed from the place where the bill or note represents him to reside, and for the same reason where he did reside at the time the bill was drawn or the note made, the holder is bound to use every reasonable endeavour to find out whither he has removed, and if he succeed, present it for payment. (*Chitty on Bills* 334-5. *Riley's Ed.* 1821, and the cases there cited.) And if we examine into the nature of the contract between the indorsee and indorser, we must admire its reasonableness and good sense, however arbitrary the rule itself may be in terms. The indorsement is literally and substantially an order on the maker of a note to pay the amount to the indorsee. Its object, therefore, cannot be attained without its presentment, and hence the obligation which it imposes on the indorsee, and if he intends to discharge it, the enquiry would suggest itself, where does he reside, or where is he to be found? He knows too that our places of residence are changed as often as interest or fancy prompts, and he takes it, subject to that inconvenience; as a part of the contract, therefore, the rule imposes no hardship, especially when qualified by the exceptions which dispense with a demand, where the maker has absconded or removed into a distant country.

On the second ground also, the defendant is clearly entitled to a new trial. It is not necessary, I am aware to endorse a note payable to bearer in order to transfer it; that may be done by delivery. For the plaintiff, it is contended, that such an indorsement is in effect a bill of exchange drawn by the indorser on himself, and that, therefore, it is not incumbent on

the indorsee to look elsewhere for the payment; and *Puller's N. P. 273, 7th Ed. by Bridgman*, is relied on as an authority in point. The case of *Wilmore vs. Young*, said to have been decided by *Eyre*, at Guildhall M. 1. Geo. II. is referred to in support of the text, where it is said that to charge the indorser of a note payable to bearer, it is not necessary, to make a demand on the drawer, because "the indorser is in nature of an original drawer." However we may venerate the opinion of that learned judge, as a *nisi prius* case, it cannot be regarded as conclusive authority; and if we adopt the reason on which it is founded, it proves too much, and is destructive of the whole fabric which has been founded on the theory of indorsements. Every indorsement is equivalent in its effects to drawing a new bill, and the indorser in almost every respect is considered as a new drawer: (*Chitty on Bills* 183,) and if that reasoning prevail, there would be no necessity in any case to make a demand on the drawer of a bill, or the maker of a note. Whatever similitude the indorsment of a note payable to bearer may have to a bill of exchange, and however nearly the indorser may be assimilated to an original drawer, it is evident from the nature of things that something more was intended and must be implied than belong to these relations. If he intended only to charge himself, why let it be asked, did he not do so by making his promissory note, or drawing a bill on himself in the usual way? Why put beyond the reach of his control a fund which might possibly enable him to meet it, by endorsing and delivering the note? A conclusion so much at war with common sense will never be imputed to such astute and intelligent men as compose the mercantile community. The indorsement of such a paper must, therefore, mean something more than a mere charge upon the indorser, and I am unable to see any reason why it should be distinguished from the ordinary case of indorsing a note payable to order. So far as it goes to charge the indorser the effect is the same, and although it may not be indispensably necessary to enable the indorsee to make a demand on the drawer, yet it is calculated

to remove any suspicions that might arise as to the manner in which he obtained the possession. There cannot, therefore, exist any good reason why it should not impose the same obligation on the indorsee to make the demand on the drawer of the note; and with the exception of the case noticed, the books contain no such distinction. On this ground, therefore, the motion is granted.

X An argument in opposition to the motion has been drawn from the circumstance that the note was dated at Charleston, and hence it is concluded that it is made payable there, and as such the plaintiff was not bound to present it for payment elsewhere, but this question is concluded by the case of *Miller & Co. vs. Thompson*, (a) decided during this term. The place at which it is to be paid is not necessarily indicated by the place at which it is dated.

Petigru & Cruger, for the motion.

Clarke, contra.

JOHN WINGIS vs. W. J. SMITH, Jr.

A master of a slave is not liable for damages resulting from the negligence or trespass of his slave;

But slaves who are tradesmen, ferrymen, carriers, and others acting in such like capacities, form exceptions to this rule. In such cases, the master by inviting others to repose a confidence in them, becomes security for the faithful performance of their duty, and must be answerable for their neglect.

Tried, at Charleston, in February Term, 1825, before Mr. Justice Waties.

This was a special suit, brought on a summary process, for damages occasioned by the negligence of the servant of the defendant.

The evidence was; that the empty carriage and horses of the defendant were seen standing near a house in the village of Hamstead, and the driver not on his seat; that they were

(a) Not reported, as it contains no other principle than as stated above. R.

afterwards observed to move from thence, at first slowly, but soon, at a furious rate; and on their way encountered a bread cart belonging to the plaintiff, which was standing at a door in the same street, and which was broken in pieces by the encounter, and the driver of it much hurt. The coachman was seen running after the carriage, and the horses were said to be, generally, orderly and well broke: The court inferred from this, that the injury done to the plaintiff must have been owing to gross negligence in the coachman, who could not have been on his box, and could not have been watching his horses, as it was his duty to do. His honor therefore, thought the master was answerable for such negligence, and decreed that he should pay to the plaintiff, thirty dollars for the cost of repairing his bread cart, and also five dollars more for the loss of the services of his driver for one week. From this decision there was an appeal to this court.

NOTT J.—This unfortunate species of property is constantly presenting us with cases involving considerations of policy rather than law, and in which little assistance can be derived from authority.

Slavery has existed in almost all countries and in almost all ages of the world.

It existed among the Jews, God's chosen people, and was sanctioned by divine authority.

It has existed in England, in a more abject state than was ever allowed in this country. *Hallam* in his *History of the Middle Ages*, says, "in England it was very common, even after the conquest to export slaves to Ireland, (2 *Vol.* 263.) Another writer accuses the Anglo-Saxon nobility of selling their female servants, even when pregnant by them, as slaves to foreigners. And a third says, that the English, before the conquest, were generally in the habit of selling their children and other relations to be slaves in Ireland, without having even the pretext of distress or famine; (*Do.* in notes.) Villeinage, as it was called in England, was only another name for slavery. A villein could not hold property; he

had no civil rights, except what was allowed by his master, (2 *Blackstone Comm.* 934. 1 *Hallam* 120-2-3-4. 2nd *Do.* 198, 206.)

In Rome, slaves were not less subject to the absolute and despotic will of their masters. At one time, the master held the power of life and death over them. (*Adams' Antiquities* 37.)

It is from those two sources, the common and the civil law, if any where, that we are to derive the principles by which questions of this sort are to be governed. But, altho' we can ascertain that slavery actually existed in both those countries, yet such was the different situations of their slaves at different periods, that it is not easy to trace the reciprocal duties and liabilities of master and servant: (*vide Reeves' Eng. Law.* 99.) Even if the task were less difficult, the condition was so different from that of our slaves, that we should profit but little by the research.

In England a villein had all the privilege of a freeman in respect to all persons except his master. He might maintain actions for personal injuries, and although he might defend himself by a plea of villeinage, in an action brought against him, I do not find it any where laid down, that his master was liable for damages resulting to another on account of his trespasses or negligence.

By the civil law, a person was allowed what was called *actio noxalis* by which a master was made liable for any damage done to another by his slave, such as theft, robbery or any other damage. But he was equally liable for any damage done by his horses, cattle or other animals. He might, however, relieve himself from liability in either case by delivering up the slave or animal to the party injured and was not held answerable for more than his value: (*Cooper's Justinian* 354. 357, *passim.* 1 *Domat* 305.) *Puffendorf* recognizes the correctness of this principle, (book 3. page 6.) The ground of liability according to this author is, that the slave, if free, would have been answerable for

his own act, and the beast in a state of nature would be subject to the will of the injured part: The master therefore, by enslaving the one and domesticating the other, became liable to the extent of their value. Some such notion as this, it seems to be thought by some writers gave rise to the doctrine of deodand which condemned even the instrument by which death was occasioned, to expiate the offence it had committed. *Grotius*, however, differs in opinion from *Puffendorff*; he thinks the master not liable for the act of his servant or beast; but *Barbeyrac* in his notes on that author takes a middle course: he thinks the master ought to be answerable for the acts of his slave, but not for those of his beast. (*Grotius Lab.* 2. c. 17. 375. yet in none of these cases does the extent of the liability seem to be very well defined.

Even to this day, the doctrine of the common law, in relation to the subject does not appear to be very well settled. Judge *Blackstone* says, if a servant by his negligence does any damage to a stranger, the master shall answer for his neglect: Therefore; if a smith's servant lame a horse while he is shoeing him an action lies against the master. And upon this principle, says the same author, by the common law, if a servant kept his master's fire negligently, so that his neighbour's house was burned down, thereby, an action lay against the master, because the negligence happened in his service; otherwise if the servant going along the street with a torch sets fire to his neighbour's house; for then he is not in his master's immediate service; (1 *Blackstone's Com.* 431.) The same doctrine is laid down in the same vague manner in *Noys Maxims* c. 44. p. 95. 112, and in *Doc and Student* c. 42. p. 237. And each of these learned authors gives the other for authority. But that is too vague and general to constitute any definite rule of decision. In the case of *McManus vs. Cricket*, 1 *East*, 106, it was decided after a review of all the cases upon the subject, that a master was not liable for a trespass committed by his servant.

Judge *Reeves* in his treatise on *Domestic Relations* finds great fault with that decision. He says, there is no difference with respect to the liability of the master between an injury arising from negligence and one occasioned by a direct trespass or tort. And I am not prepared to say that I am satisfied that there ought to be any such difference. Judge *Reeves* seems to consider it as a conceded point, that in England a master is liable for the negligence of his servant. But I am not satisfied that that question is conclusively settled in England. Most of the cases relied on by that learned judge, *Savignac vs. Roome*, 6 D. & E. 125. *Morley vs. Gaisford*, 2 H. Blackstone 442. *Jones vs. Hart* 2 Salk. 441. & *Day vs. Edwards*, 5 D & E. 648, turned upon the nature of the actions. No question was made with regard to the liability of the master.

Among these conflicting opinions then, we may at least feel ourselves untrammelled by authority, if the English decisions could be considered authority on such a question. The importance, however, of this question is not diminished on that account. It is, therefore, satisfactory to find that we have a decision of our own directly in point. The case of *Snee & Tyce, 2 Bay, p. 345* depended upon the same principle as the case now under consideration: In that case the defendant's negroes had suffered a fire to break out from the field where they were at work and to burn up the plaintiff's crib of corn. The court held that the defendant was not liable for the negligence of his servants. The question was decided upon general principles and not upon the particular circumstances of the case. Whether the result of the neglect be the burning of a corn crib, or the breaking of a cart, the principle must be the same. That case has always been received as law, and it would now be unwise to innovate upon a principle which has been so long established. Tradesmen, ferrymen, carriers and others acting in such like capacities are exceptions to the rule. In those cases, the master by inviting others to repose a confidence in them, becomes security for

the faithful performance of their duty and must be answerable for their neglect. Judge *Blackstone* in illustrating the principle as laid down by him, (1 vol. p. 431,) which has already been alluded to, gives the instance of a smith who lames a horse by shoeing. And if that is the whole extent to which the doctrine is carried in England, then are our decisions conformable to the law of that country. Particular cases of hardship may grow out of the law as thus settled: But we cannot foresee the extent of the liability which would spring from a contrary doctrine. The decision appears to be founded upon the policy of the country, and I am disposed to think it correct. It is at least one, on which it would be dangerous to be trying experiments. The interest of the master affords a higher security against misconduct or negligence of his servants than any liability which the law could impose.

I am of opinion, therefore, that a new trial ought to be granted.

Arson & Grimke', for appellants.

Eckhard & Toomer, contra.

(a) See *Croft vs. Alison*, 4 *Barnwell*, and *Ald.* 590. and *Weylands, vs. Elkins*, 1 *Holt's Rep.* 227. To the latter case a note of cases is added by the Reporter. It appears from the following extract that, by the laws of Rome, before the time of Justinian, the condition of the master could not be rendered worse by the act of his slave.

"Ejus bona, qui falsam monetam percussisse dicitur, fisco vindicantur. Quod si servi ignorante domini id fecisse dicantur, ipsi quidem summo supplicio afficiuntur; domino tamen nihil aufertur, quia pejorem domini causam servi facere, nisi forte scieret, omnino non possunt. Julius Paulus, de Jure iuri et populi. See Schultengius Jurisprud. Vet. Anti Justin.—481.

At a very early period, even before the arrival of the Saxons, we find that slavery existed in England. (*Strab*, l. 4.) though indeed according to Cæsar the lower classes were not much above the condition of slaves. (*B. G. L.* 6. c. 13.)

A very large proportion of the Anglo Saxon population was in a state of slavery. (*Bigland's history of England*, 1st vol. 75.) The higher classes seized on the poor and indigent and reduced them and

their infants to slavery; and not only sold women in a state of pregnancy, but as the author of the life of Wolfstan, Bishop of Worcester, says "got them with child that they might bring a better price," (*Anglia Sacra*. T. P. 285. *Turner's history of the Anglo Sax.* vol. 3. chap. 9, n. *Hen. History Great Britain*, vol. 4, 238.) They were sold in Rome, Ireland, France and other countries. See *Bigland's*, *Hume's*, and *Henry's Histories of Eng.* *Turner's, Anglo Sax.* &c. We also, know from the celebrated story of the English slaves in the market at Rome from *Bede* and repeated by all the English Historians, that the holy father the Pope permitted this traffic.—Slaves were allowed to be whipped, put in bonds, branded, &c. and on one occasion are spoken of as yoked. "Let every man know his teams of men, of horses and oxen." (*Wilkins Leg. Sax.* cited by *Turner*, vol. 1.) A French Historian states that this was the case with the greater part of the peasantry in the time of *Louis XI.* who died in 1483. (*P. de Bussieres, Soc. Jcs. Hist. France*, l. 11.) And in our own day a Frenchman says "I recollect to have seen in France, that land of gallantry, a woman and an ass harnessed together to the same plough, and the tattered peasant behind stimulating his team with a seemingly impartial whip. (*Travels of a Frenchman, Simonde*. vol. 1st, p. 274.)

Anglo Saxon Freemen, were frequently servants, and had their masters, as may be shown by the ancient English legal collections. "If any man give flesh to his servants on fast days, whether they be free or servile, he must compensate for the pillory." *Leg. Wihtraed*. So in the laws of *Ina*; if a freeman work on Sunday without his lord's orders, he shall lose his liberty or pay sixty shillings.

Wives must have been regarded in some measure as slaves, for for we see frequent mention of the purchase of them: In the laws of *Ethelbert* the first Christian, King of Kent it is laid down, "If a man buy a maid with his money let her stand for bought, if there be no fraud in the bargain; but if there be, let her be returned home, and the purchase money restored." Which law, no doubt, was founded on the civil law doctrine that a sound price deserves a sound commodity.

It is supposed that the number of slaves was rather increased than diminished by the Norman conquest. Four different classes are enumerated by the authors of that period.

1st. *Villeins* (i. e. villagers) *in gross*, who were the personal property of their masters.

2nd. *Villeins regardant*, or predial slaves annexed to the land, *adscriptitii glebe*, and were sold with it. They were pretty much the same as those mentioned by *Tacitus*, among the Germans. (*De Mor. Germ.*)

3rd. *Cottars*, who were men that had been instructed by order of their masters in some trade or art; as that of smiths, carpenters, &c. and were in every respect on the same footing with villeins or predial slaves.

4th. *Borders*, whose condition is not distinctly ascertained, but most probably were a kind of upper domestic servants. (*Henry's Great Britain*, 6 vol. 3. 5.)

The Norman conquerors, for some time, treated their English slaves with so much severity, that a cotemporary writer, in the collection of *Gale*, cited by *Henry*, declines giving any description of it; "because its inhuman cruelty would appear incredible to posterity."

Much information as to the state of slavery in the time of *Richard Coeur de Lion*, is to be found in the novel of *Ivanhoe*.

The great charters of *Henry III.* place the offence of destroying men and goods on the same footing. (*Blackstone's Law Tracts.*)

In the *Annals of the Priory of St. Dunstan*, is the following entry, "A. D. 1283: This year in the month of July we sold our slave Wm. Pyke, and received one mark of the buyer." As *Dr. Henry* observes, if one mark was the whole of his price, men must have been cheaper than horses, or Pyke must have been a worthless fellow.

By the statute 1st. *Edw.* 6th. *chap.* 3rd, A. D. 1547, it was ordained that all idle vagabonds should be made slaves and fed on bread and water or small drink and refuse meat, should wear a ring of iron round their necks, arms, or legs, and should be compelled, by beating, chaining, or otherwise, to perform the work assigned them, were it ever so vile. (*Stat. at Large*, 5 vol. *Pickering's Ed. Blackst. Com.* 1 vol. 14th c. *Jac. Law Dic.—Slaves.*) In the same reign Sir *Thomas Smith*, who was Secretary of State to the king, observes that he never knew of any villeins *in gross* in his time, and that villeins appendant to manors (villeins regardant: *glebæ adscriptitii*) were but few in number: that since England had received the christian religion, men began to be affected in their consciences at holding their brethren in servitude; and that upon this scruple in process of time, the holy fathers, monks and friars, so burthened the minds of those they confessed, that temporal men were glad to manumit all their villeins. But he adds, the holy fathers themselves did not manumit their own slaves, and the bishops behaved like other ecclesiastics.—But at last some bishops enfranchised their villeins *for money*, and others on account of popular outcry: and at length the monasteries, falling into lay hands, were the occasion that almost all the villeins in the kingdom were manumitted. (*Smith's Repub.* cited by *Dr. Cooper* in the notes of his edition of the *Institutes of Justinian*, 414. *Atta's Encyclopedia, Villein.*

The reason given by Dr. *Henry* for the diminution of villeins was, that they had ceased to be profitable.

Villeinage was at last virtually abolished by *Statute 12, Car. 2. Recs Ency. Villen.*

It would far exceed the limits of a note to point out the method by which men were reduced to slavery and manumitted, and their condition at various periods; suffice it to say that they were slaves in every sense of the word.—*Daines Barrington* in his observations on *magna carta* says that villeins who were held by servile tennures were regarded as so many negroes on a sugar plantation.

It was held so late as 5 *Wm. and Mary, A. D.* 1693, that one might have property in a negro; because negroes are heathen. (1 *Ld. Raymond*, 147.) But it was decided 1772 in *Somersetts* case (1 *Loff's Rep.* 1,) that even a *heathen negro*, when brought to England, is entitled to his freedom.

It is now the law in that country, that a slave so soon as he lands becomes free; but notwithstanding all their boast, the horribly practice of impressing seamen, is nothing more nor less than kidnapping and making them slaves.

Slaves are still held in large numbers in the English West India Islands: and the Reverend Society established in Great Britain for propagating the gospel in foreign parts, owned a plantation and negroes in Barbadoes in 1801. (*Edward's History West Ind.* 2 vol. p. 41.)

Negroes were first pointed out to his countrymen as an article of commerce by *Alonzo Gonzales*, a Portuguese; and in the course a few years no less than thirty seven ships were fitted out in this trade. The greatest dealers in this traffic, were the Spaniards, who having almost destroyed the natural inhabitants of Spanish America, supplied their places in working their mines, with negroes, so early as 1502. The Genoese undertook to furnish the Spaniards with negroes at a concerted price between them, and for this purpose formed the famous *Asiento contract*, which was afterwards successively transferred to Portugal, France and to England. The English yielded it to Spain in 1750, because they had been losers by the trade; and then they preached universal emancipation.

O Cives, Cives, quærenda pecunia primum

Virtus post nummos.—

See *Edward's West Indies; Recs' Ency. Asiento; Walsch's Appeal.*

John Hawkins, who sailed in 1562, is the first Englishman who is known to have engaged in this commerce. (*Edw. West Ind.*) See also *Hakluyt's Collection of Early Voyages*, where there is a full account of *Hawkins's* expedition.

Negroes were introduced into Virginia in 1620, and into Massachusetts and Connecticut in 1638. (*Tucker Blackstone*, 2 vol. note H.) They were probably brought into South Carolina at its first settlement in 1670, as we find that four years after, they were owned by the governor, Sir John Yeamens, and his followers, who had brought them from Barbadoes. (*Ramsay's Hist. South Carolina*, 1 vol. 35.)

With regard to the children of villeins, slaves &c. in the middle ages, the rule in France, and most nations on the continent was, that they should follow the condition of the mother. But the rule was the reverse in England. (*Du Cange, Gloss. Med. et Inf. Lat. Servi.*) But it appears from a citation from *Bracton*, in the notes to *Hallam* (1 vol. 232, of the Philadelphia Ed.) "that the spurious issue of a nief, though by a free father, should be a villein, *quia sequitur conditionem matris, quasi vulgo conceptus*. l. l. c. 6. In South Carolina, the children follow the condition of the mother, (see *Gayle vs. Cunningham, Harper's Eq. Rep.* 124.) The English rule it appears was adopted even more extensively in St. Domingo; for all mulattoes became free at the age of twenty-four, until 1674, when by a royal edict the civil law doctrine was recognized.—(*Wimpffin's St. Domingo*, 61.)

The following curious case is reported in 3 *Mod.* 120.

"Sir Thomas Grantham bought a monster in the *Indies*, which was a man of that country, who had the perfect shape of a child growing out of his breast as an excrescency, all but the head. This man he brought hither, and exposed to the sight of the people for profit. The *Indian* turned *Christian* and was baptized, and was detained from his master.

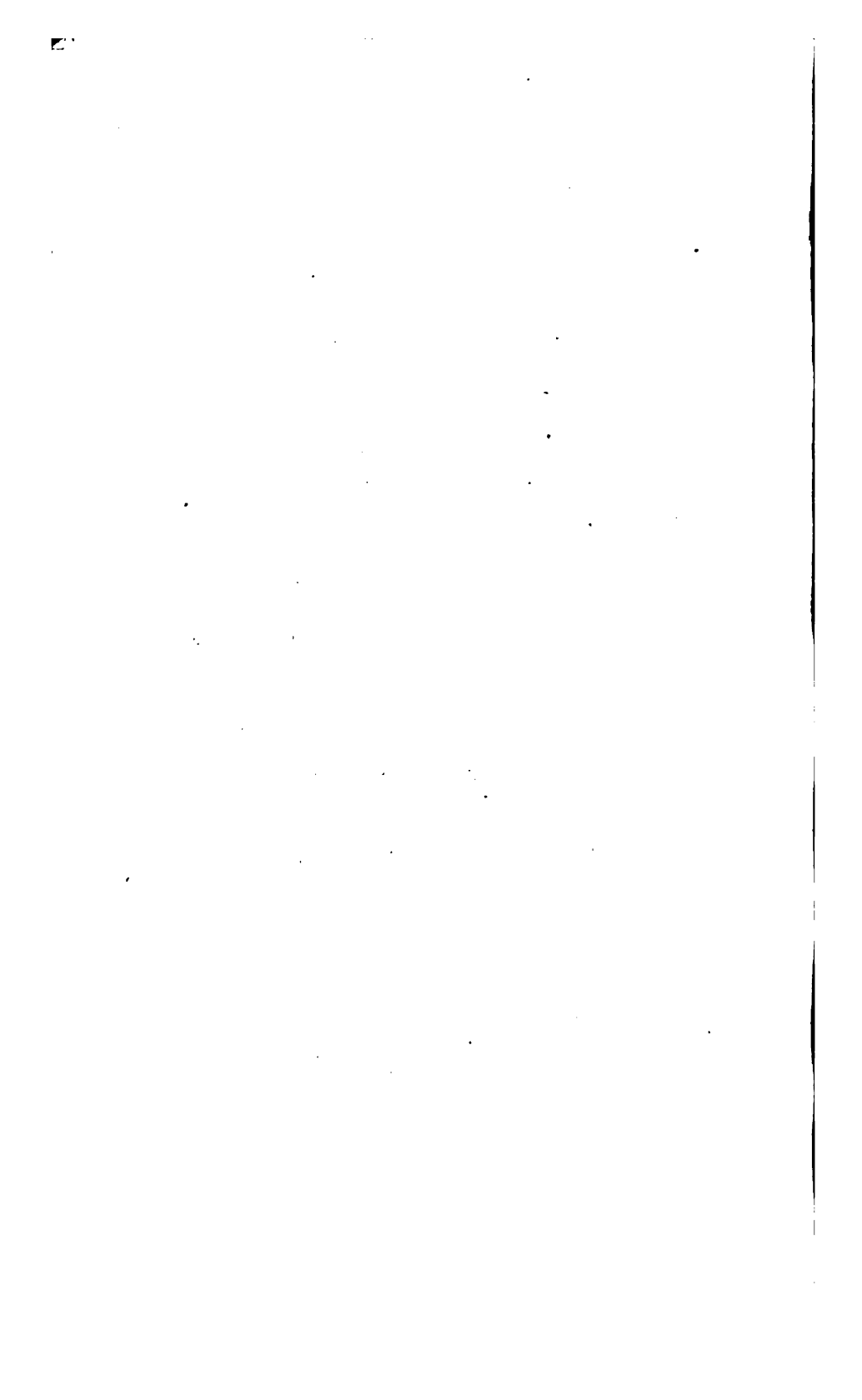
The master brought a *homine replegiando*.

The sheriff returned that he had replevied the body, but did not say, the body in which *Sir Thomas* claimed a property; whereupon he was ordered to amend his return.

And then the court of common pleas bailed him."

Since writing the above note, I have observed that, the Louisiana Code, has adopted the civil law process, *actio noxalis*. (*Code, Tit. VI. ch. 3, Slaves.*)

R.



COURT OF APPEALS,
OF THE
STATE OF SOUTH CAROLINA,

January Term, 1826—Columbia.

JUDGES PRESENT,

Nott, Colcock, Johnson.

DAVID C. REEDER *ads.* JACOB CRAIG.

Upon an action brought upon a note given for the purchase money of a tract of land, the defendant cannot set up by way of defence, an outstanding title for a part of it, which out standing title had been bought up by the plaintiff (vendor) since he sold to the defendant.

For if a man sell land to which he has no title, and afterwards acquire a title, he is estopped by his first deed to say he had no title at the time he sold.

Tried before his Honor Judge Huger, at Newberry
October term, 1825.

The plaintiff brought his action on a note given for the purchase money of a tract of land, to which the defendant set up a defence by way of discount, that there was an outstanding title in a third person to about one half of the tract of land. The plaintiff admitted that at the time the contract was made and the title from plaintiff to defendant executed, there was an outstanding title. But a short time before the commencement of his action, and long after the execution of the deed from plaintiff to defendant, the plaintiff procured the person having the title to the land, to execute a title to the plaintiff

himself. The plaintiff, however, had never executed to defendant a second title of the land subsequently acquired by him.

His honour the presiding judge, determined that the defence could not avail the defendant, and the jury found a verdict for plaintiff for the full amount of the note.

The defendant appealed and moved for a new trial on the following grounds:

1st. Because at the time the note was given there was an outstanding title in a third person to half the tract of land.

2nd. Because the execution of a title from the person holding the outstanding title to the plaintiff, subsequently to his conveyance to defendant, did not give defendant a legal title to the land.

NOTT. J—If a man sell land to which he has no title, and afterwards acquire a title he is estopped by his first deed to say he had no title at the time of sale. 1 *Harris & M'Henry*, 523, *Hawkins vs. Hanson. Co. Lit.* 47. b, 352, a. *Plowden*, 434. 10 *Ves.* 460. *Termes de la Ley*, 209.

The motion is refused.

Bauskett & Dunlap for the motion.

O'Neal and Johnson, contra.

SAMUEL W. SHELTON, ads. THOS. CURETON, Esq. Ordinary.

Where the ordinary at the motion of securities to an administration bond discharges the administrator and appoints a new administrator, the securities to the first administrator are still liable for all defaults of their administrator to the time of his discharge.

To prove the amount of their liability, the decree in equity against the administrator may be given in evidence, on a suit against the securities on their bond.

But where a part of the items in the decree, was for other matters than those of the administration, and a verdict was taken against the securities for the whole amount; the court granted a new trial ~~and~~ the plaintiff released the amount of such items.

Tried before his honor judge Colcock, October term,
1824.

In this action the defendant was sued as one of the securities on a bond given to the plaintiff, as ordinary, conditioned in pursuance of the act of the legislature, for the administration of Sarah and Robert Cates on the estate of Robert Cates, deceased.

The defendant put in two pleas.

In the first, after craving oyer he pleaded a general performance of the condition of the bond. To which the plaintiff replied that the administrators did not perform the condition of the bond, in this, that they did not administer the estate according to law, and did not pay to Asa Cates, Aaron Cates and Robert Cooper and wife, \$747 57, being \$249, 19 each, their respective shares of \$3364 6½, with which the administrators were charged, on account of their administration of the estate, in an account had by order of the court of equity, in a suit wherein the distributees above named were complainants, and the administrators, and others, were defendants; and of which sum of \$3364, 6½ the administrators by the decree of the said court at February Term, 1823, were ordered to pay to said distributees the amounts to which they were respectively entitled.

The replication concluded with a verification praying judgment, &c.

The defendant rejoined that the plaintiff ought not to have, &c. because he together with a certain Wm. Darby, a co-obligor, conceiving themselves in danger of being injured by their securityship, on the 1st January, 1821, petitioned the court of ordinary, to which they stood bound, for relief, in pursuance of the act of the legislature. That such proceedings were had on the petition, that the plaintiff as ordinary on the 12th Jan. 1821, revoked and annulled the said letters of administration, and afterwards, on January 19th, 1821, granted letters of administration, *de bonis non* of the said estate, to Sarah Cates alone.—That afterwards on the the 29 of Jan. 1821, Sarah Cates and R.T. Cates by requisition of the plaintiff, as ordinary, accounted with Sarah Cates, as sole administratrix, *de*

bonis non, for their administration; and all the rest of the estate, that was found remaining upon that accounting, the same being allowed of by the plaintiff, as ordinary, was delivered and paid over by Sarah and Robert T. Cates to Sarah Cates as sole administratrix *de bonis non*.

This rejoinder concluded with a verification. The plaintiff put in a general demurrer and the defendant joined.

In the second plea the defendant set forth his discharge by the plaintiff, as ordinary, substantially the same as is stated in the rejoinder above mentioned, and concluded with a verification. To this plea the plaintiff replied that he ought not to be precluded, because Asa Cates, Aaron Cates, and Cooper and wife, on the 23d May, 1821, filed their bill in the court of equity against Sarah Cates and Robert T. Cates, administrators of Robert Cates, deceased, and others, amongst other things for a general account touching the administration of Sarah and Robert T. Cates, on the estate of Robert Cates, deceased. That the court of equity at February Term, 1823, ordered a reference to the commissioner of that court, and upon such reference being had, the commissioner charged and reported against Sarah and Robert T. Cates, administratrix and administrator, the purchase made by Robert T. and John S. Cates, at the sale of Robert Cates, deceased, and which had been set aside (\$2067 60½), several articles of property which Sarah and Robert T. did not sell, the rent of the lands, and the hire of a negro boy for two years after the death of Robert Cates, deceased, and interest on the respective sums, making in all \$3541 50¾, which report of the commissioner, was confirmed by the court of equity at February Term 1823. And that Sarah and Robert T. Cates, were ordered to pay to the said distributees the amounts to which they were respectively entitled. The plaintiff then averred that the distributees were entitled to receive \$747 57, and that the said Sarah and Robert T. Cates, had not paid the same, and concluded with a verification. The defendant demurred generally to the replication, and the plaintiff joined in demurrer.

On the trial of the cause the court decided against the defendant in the action on both demurrers, and directed the jury to find for the plaintiff the amount of the commissioners' report and interest.

They found accordingly.

The defendant appealed and moved the court to reverse the decision of the circuit judge on the points of law embraced in the pleadings, on the grounds:

1. That the plea of a discharge by the plaintiff as Ordinary, is a good defence to the action, and the replication thereto is no answer to it, and is a departure in pleading. Therefore the demurrer to the replication should have been sustained.

2. The plaintiff's replication to the plea of general performance is well answered by the rejoinder and the matters contained in it. Therefore the demurrer to the rejoinder should have been overruled.

3. If all the facts contained in the pleadings on both sides be taken as true, (and the state of the pleadings presents the case) the law of the case is with the defendant.

4. If the defendant could not succeed on the above grounds he then moved the court to set aside the verdict, on the ground that there were items contained in the report of the commissioner on which the jury founded their verdict, for which the defendant as security could not be liable.

COLCOCK, J.—In order to determine the question involved in the first ground, it becomes necessary to consider what are the powers given to the ordinary's by the act, in such cases as the one before us? the trust of an administrator being one of great responsibility and not unfrequently involving duties of a difficult character and liabilities to a great amount?

The legislature thought proper to provide a mean whereby securities might protect themselves from the injudicious or vicious conduct of their principals. To this end it was enacted that "if the securities for administrators conceive

themselves in danger of being injured by such securitys; they may petition the court, to whom they stand bound, for relief, which court shall summon the administrator to appear and thereupon make such order or decree as shall be sufficient to give relief to the petitioner." In the exercise of this power the Ordinary will, on a case being properly made out, discharge the securities, by revoking the administration, and granting a new power to some other person, or to the same administrator with other securities; which latter course was pursued in this case. Now the question is, does such discharge release the securities from such liability as attached to them at the time of the revocation of the administration? The power of the Ordinary is in any point of view a very extensive one. But to effect the object of the defendant it must be more extensive than any hitherto given to any tribunal in this country. What do the securities undertake in this case for their principal? The condition of the bond shews. It is in these words. "The condition of the above obligation is such, that if the above bound A. B. administrator of the goods and chattels and credits of C. D. deceased, do make a true and perfect inventory of all and singular the goods and chattels and credits of the said deceased which have or shall come to the hands, possession or knowledge of the said A. B. or into the hands or possession of any other person or persons for him, and the same so made, do exhibit to the said court, when he shall be thereunto required, and such goods and chattels and credits do well and truly administer according to law, and do make a just and true account of his actings and doings therein when required by the said court, and all the *rest* of the said goods and credits which shall be found *remaining* upon the account of the said administration, the same being first allowed by the said court, shall *deliver* and *pay* unto such persons respectively, as are entitled to the same by law; and in case of a will being discovered, shall surrender such administration &c. If then the administrator does not pay to those who are entitled by law to receive, there is a breach of the bond, for

which the securities are liable. And if they do not administer according to law there is a breach, and for this the securities are also liable. Now the court of equity, a court of competent jurisdiction, have determined that this administrator and administratrix for whom the defendants are bound had not administered according to law, in that they had (or one of them had) purchased property at their own sale for which they had not paid, and had omitted to sell other articles which should have been sold. And upon a report of the commissioner touching these matters of default it was decreed that the administrator and administratrix were in default a large sum, to wit, \$3541 50; which they were ordered to pay over to the distributees. These were all liabilities which attached at the time of the discharge. Now, admitting that the discharge could operate as to future liabilities, it cannot affect those which did exist. There is no power which could release the securities from such. The replication to the plea of discharge then was good, and the demurrer to the replication was properly overruled.

Under the third ground it was contended that the decree of the court of equity was not conclusive against the securities, because they were not parties to it. Their liability is to make good the injury which may be sustained in consequence of the misconduct of their principal. Now in the question, whether their principal has been guilty of any misconduct, they cannot be parties. It is not necessary they should be parties; for they cannot be supposed to know every thing about the affairs which are committed to the management of their principal.(a) The security is never sued with the principal in cases in which he is not bound to do the same thing which the principal undertakes to perform.

The judgment of the court may be looked into by the securities in order to see that it was rendered against the principal for those acts for which they became responsible. And

(a) See ante 225, the case of *Lyles vs. Caldwell*.

R.

this leads to the last ground taken, that the decree in this case was for matters for which the administrators were not answerable in their representative capacity, and therefore a new trial is granted, nisi the plaintiff releases the defendants from the verdict, for all such matters as were not properly chargeable to them as administrators; and if such release be not given, the defendants have leave to plead to such matters. The case of *Cureton vs. Darby*, the other security, depends upon this case, and the same order is made as to that.

Bauskett & Dunlap, for the motion.

O'Neal & Johnston, contra.

V. PRIMROSE vs. BECKET & WILKINS.

Under the act of 1815, allowing executions to be issued at any time within three years after the signing and enrolling of judgment, without any revival of the same, where a judgment was signed 29th April 1822, and *fi. fa.* issued the next day, which was returned, without any proceedings, and no other proceedings had until a *fi. fa.* was issued the 18th April, 1825, and on the 15th June, a *ca. sa.* under which the defendant was imprisoned, the court discharged the defendant, and set aside the *ca. sa.* on the ground, that it issued more than three years after judgment, and was not a renewal of the *fi. fa.*

Tried before judge Huger, at Richland, fall term, 1826.

In this case the plaintiff obtained a judgment against defendants, at spring term, 1822, and issued his *fi. fa.* bearing date the 29th April, which was returned October term following, "*nulla bona.*" And here the proceedings rested until the 18th April 1825, when an *alias fi. fa.* was issued and on the 15th of June a *ca. sa.* upon which the defendant Becket was arrested, who now moved the court to be discharged, and the following order was granted: "It appearing that the *ca. sa.* in the above stated case, had issued above three years after the signing of the judgment and that execution had not been annually renewed, it is therefore ordered that the *ca. sa.* be set aside, and that David Becket, who is

now confined by virtue of said *ca. sa.* be discharged from his confinement "

The plaintiff moved the court of appeals to set aside the above order:

1st. Because the law does not require executions to be renewed annually.

2nd. Because the issuing, the *alias fi. fa.* kept the judgment alive, and gave to the plaintiff a right to issue a *ca. sa.*

3rd. Because the granting of the order was in direct opposition to an express act of the legislature, and contrary to law and justice.

COLCOCK, J.—The words of the act are " that it shall and may be lawful to issue execution on any judgment or decree of any court of law or equity in this State, at any time within three years next, after the signing or enrolment thereof without any revival of the same."

By which the legislature have dispensed with the necessary formalities of the common law of reviving a judgment and renewing execution for the period of three years next after the signing of the judgment. The question then is, has the *ca. sa.* in this case been lodged within that period? On an examination of the proceedings, it appears that the judgment was signed on the 29th April, 1823, and *fi. fa.* issued on the 30th (the next day) on which is endorsed " no proceedings, execution returned." also " returned February, 1825," and " renewed 18th April 1825." This renewal was a *fi. fa.* and lodged on the same day. On the back of it is written " In this case the sheriff will proceed on the *ca. sa.* 14th June, 1825, (signed) J. O'Hanlon," upon which there is no return. It further appears that a *ca. sa.* was issued on the 14th, and lodged on the 15th June, 1825, with a direction to the sheriff to proceed on this execution and not on the *fi. fa.* which is dated 14th June, 1825, and is returned by the sheriff "*remi corpus*, 8th October, 1825." By which it is clear that the execution which has been set aside was not issued within the time given by the act.—The judgment having been signed

29th April, 1822, and the *ca. sa.* issued on the 14th June, and lodged on the 15th June, 1825, nearly two months after the three years.

But it was contended that the last execution may be considered as a renewal of the one issued within the three years. If it could be so considered, I should have no doubt of its validity; but a plaintiff may have both a *fi. fa.* and *ca. sa.* at the same time, though he can proceed only on one of them. Now here the second *fi. fa.* was taken out on the 18th April, 1825, and lodged with the sheriff, and remained in his office unreturned. The *ca. sa.* was then not a renewal of that, and it cannot be considered as a renewal of the first, because that was *functus officio* when the *ca. sa.* issued, having been returned to the clerk, who had issued another *fi. fa.* thereon. It was further contended that the issuing of the second *fi. fa.* should be considered as a revival of the judgment, and that an execution might issue at any time within three years thereafter. But that would be a latitude of construction not warranted either by the words of the act, or the rules of construction, as applied to acts impugning the common law. There are no words in the act which authorize us to say, that the issuing of execution is to be considered as a revival of the judgment; on the contrary, the act expressly says the execution may be issued at any time, within the three years without renewal; nor can we extend the operation of the act beyond the obvious intention of the legislature, which was, to consider the judgment as operative for three years; the common law rule, which requires renewal after a year and a day, to the contrary notwithstanding.

Motion dismissed.

O'Hanlon, for the motion.

Willisson, contra.

JOSEPH WOOD vs. EDMUND GEE.

Plaintiff sold and conveyed to the defendant a tract of land, upon which the defendant entered and took possession: Upon an action of assumpsit for the purchase money, the court held, that the plaintiff might recover, although the contract was never reduced to writing: For, The contract was at an end, and there was nothing left but a promise to pay in consideration of the land thus actually transferred. Or where upon a parol contract for the sale of lands, the contract has been executed by one party, assumpsit may be maintained for the purchase money.

Tried before his honour, judge Gantt, at Darlington, fall term, 1825.

In this case it appears that the defendant had sold and conveyed a tract of land to the defendant, and this action was brought to recover a part of the purchase money. The presiding judge was of opinion that the case came within the statute of frauds, and that as the promise was not in writing, the plaintiff could not recover, and ordered a nonsuit.

This was a motion to set aside that nonsuit.

NOTT, J.—If it were to be understood that the titles were executed by the plaintiff, and not accepted by the defendant, I should concur with the presiding judge in opinion. Either of the parties may recede as long as the contract is in parol. But the brief states, that “the plaintiff offered to prove that he had made titles, and that the defendant entered and continued to exercise acts of ownership over it.” The judge appears to accede to the correctness of that statement, because he refers to it in his report and says: “the ground taken in the notice is, that where the contract has been executed by one party, assumpsit may be maintained for the purchase money. I thought differently.” The judge says therefore expressly, that admitting the fact as set forth by the plaintiff, he was of opinion, that the action could not be maintained. In that opinion I cannot concur. After the titles were made and accepted, it was no longer a contract respecting the sale of land. The contract was at an end, and there was

nothing left but a promise to pay in consideration of the land thus actually transferred.

If the promise had been in consideration of a verbal promise which had not been executed, it certainly could not have been enforced. But having been made for a consideration actually received the plaintiff was entitled to recover. It is said that this is only the statement of counsel of what he could prove, but that no such evidence was given. But the evidence was not offered, because the presiding judge held that it was not admissible. I am of opinion that the motion to set aside the nonsuit ought to prevail.

Levy & Wilkins, for appellant.

Evans & Coggeshall, contra.

JOHN N. DAVIS *vs.* CLANCY & JOHNSON.

To maintain trespass *quare clausum fregit*, the plaintiff must have either an actual or constructive possession.

A constructive possession is sufficient, where the defendant is not in the actual possession.

Where the land is leased, the landlord cannot bring the action; the tenant must.

But where a person is only put into the possession of land to prevent the trespasses of others, his possession is the possession of the landlord, who may maintain his action of *quare clausum fregit*, notwithstanding such an agent may be allowed to cultivate a part of the land for himself.

The part of the land so cultivated by the agent or tenant may be considered as in his exclusive possession, and the rest in the possession of the landlord.

The following was the report of judge Gantt, who tried the case.

"This was an action of trespass *vi. et ar.* for taking some plank. The plaintiff had never been in possession of the house, from the loft of which the loose plank was taken, unless indeed by his tenant.

The jury found for the defendant, on the following testimony.

Seth Killeiar, proved that he heard Clancy say that he took the plank from a house which plaintiff purchased of Capps; heard Johnson say that he had sold the plank to Clancy.

Clubb, the plaintiff's tenant was living on the land at the time the plank was taken, and forbid Clancy from taking the plank. About three parts of the plank in the loft was taken out.

Cross examined, says: That Clubb, lived three hundred yards from the house from which the plank was taken, and in a different enclosure. The boards were loose and Johnson had been living there. His witness proved the execution of a deed from Capps to plaintiff, of certain land.

Sessions proved that he made a survey of the land and that the house where Franklin lived was within the lines claimed by Davis.

Kelleier was again called, and said, that Johnson lived in the house where Franklin did, and was tenant to Davis. He (Johnson) sold the plank to Clancy just before he moved off.

I charged the jury that this was a possessory action, and such as could not be maintained by him in reversion. That the law gave a remedy by action on the case for waste to the reversioner, but that taking loose plank from a loft was not such an injury as would amount to waste and authorize the reversioner to bring an action; and that if it should amount to waste, still trespass *vi et armis* was not the appropriate remedy. That the action of trespass *vi et armis* might be maintained by the tenant in possession, but not by the reversioner. Whether the tenant had a title or not I did not think material. The plaintiff proved that Clubb was his tenant; and if any one had a right to the action, it was Clubb, the tenant.

Either, Clubb was tenant to Davis, or he was not; if tenant, the right of action was in him; if not, then the plaintiff

had neither an actual or constructive possession, and consequently could not maintain the action of trespass."

The plaintiff moved to set aside this verdict, on the ground, that his honour had charged the jury erroneously.

NOTT, J.—It appears from the declaration, that this was an action of trespass *quare clausum fregit*, for breaking and entering the plaintiff's close, and taking plank from his house, &c. This is a possessory action, and the plaintiff must have either an actual or constructive possession to enable him to maintain it. When the defendant is not in the actual possession, a constructive possession on the part of the plaintiff is sufficient. The possession is presumed to be in him who has the right. Johnson, one of the defendants, occupied this land as the tenant of the plaintiff the year before this action was brought. That was sufficient evidence, both of title and possession, to enable the plaintiff to maintain the action. But it is contended that the plaintiff had leased the land to Clubb, and had therefore parted with the possession; and that the trespass if any was committed upon Clubb, and not upon the plaintiff, and that the action should have been bro't by him. And that seems to have been the opinion of the presiding judge. A question has been raised in the course of the argument, whether the decisions of our courts have not altered the English law upon that subject. It is said to have been decided in this state, that the possession by a tenant is the possession of the landlord, and that he may maintain an action of trespass notwithstanding the premises may have been leased to another. But I am not aware of any decision of our courts at variance with the decisions of the English courts in that respect. There is a species of tenantry in this country which is very unusual if not altogether unknown in England. It is not unusual for persons owning tracts of unoccupied lands, to place agents on the lands for the purpose of holding possession for them, and to protect the lands from depredation. Such a tenantry is not considered as conveying any right to the tenant: Such a possession is considered the

possession of the landlord and not of the tenant, notwithstanding he may be allowed the privilege of cultivating a part of the land for his own use. The part thus occupied by the tenant, may be considered as in his exclusive possession, and no more. And I apprehend that under similar circumstances, such would be the decision in England. In the present case, the nature of the tenantry of Clubb does not appear. Whether the land was actually leased to him, and if it were, whether it embraced the whole tract, or only the field which he occupied does not appear. It would appear to me that he could not have any claim to the house where the trespass was committed, for he was called upon as a witness, and no question was made as to his interest in the case. There was no evidence therefore of the plaintiff's divestiture of possession so as to deprive him of a right of action. With regard to the evidence I shall express no opinion, because the instructions of the court to the jury on the law precluded all inquiry into the facts. I am of opinion a new trial ought to be granted.

Miller, for the motion.

Haynesworth, contra.

WILLIAM TRIMMIER, *Commissioner in Equity vs. JOHN H. HAMILTON, and others.*

Where the plaintiff sued on a bond as Commissioner in Equity, a plea that he is not Commissioner is a plea in bar.

Upon the court's ordering a plea to be stricken out as improper, it may grant time to the party to plead over.

Where the subject matter of the plea tends to shew that the plaintiff cannot maintain any action, it should be pleaded in bar, and not in abatement.

Tried before judge Richardson, Spartanburgh, fall term, 1825.

This was an action of debt on a note under seal bro't by William Trimmier, commissioner in equity of Spartanburgh, as successor in office of Simpson Foster, late commis-

sioner. There was an order for judgment by default for want of a plea, and the defendants were on terms of pleading issuably; on the second day of court, they pleaded in bar, that the plaintiff was not the commissioner in equity, nor the successor in office of Simpson Foster and concluded to the country, which plea was not verified by affidavit. On the last day of court the plaintiff's attorney moved the court to strike out the plea as being a plea in abatement, and to sign judgment as for want of a plea. His honour, granted the first motion and ordered the plea to be stricken out, as being only a plea in abatement, which could not be put in after the order for judgment by default, but refused the motion to sign judgment, and granted leave to plead over, which produced a continuance of the cause.

The plaintiff now moved the court of appeals to reverse the decision of his honour and for leave to sign final judgment, on the ground, that the defendants under the circumstances had no right to plead over, and that the plaintiff was entitled to judgment.

COLCOCK, J.—In this case, two questions arise, first whether the plea in its nature was an issuable plea?

And secondly, has a judge the power to give further time to a defendant, when he orders his plea to be stricken out?

There are many matters which may be pleaded either in abatement or bar, as best suit the views of the defendant. And therefore the argument which goes to shew, that this matter may have been pleaded in abatement does not prove that it may not have been pleaded in bar. The defendant by his default had suffered an interlocutory judgment to be obtained against him, he was therefore driven to the necessity of pleading in bar if he could do so, of which there can be no doubt. He denies the right of the plaintiff to maintain an action in the character of commissioner. This certainly goes to the destruction of the action. The subject is placed in a very perspicuous light by *Chitty*, (1 vol. p. 434.) "When-

ever the subject matter of a plea, or defence, is, that the plaintiff cannot maintain *any* action *at any time* in respect of the supposed cause of action it may and usually should be pleaded in bar; but matters which merely defeat the present proceedings and do not shew that the plaintiff is forever concluded should in general be pleaded in abatement.

"There are however some matters which may be pleaded in abatement or bar; as in replevin for goods, the defendant may plead property in himself or in a stranger either in abatement or bar; so outlawry for felony, alien enemy, and attainder, where the cause of action is thereby forfeited, may be pleaded in abatement or in bar." And he adds "when the defendant has omitted to plead in abatement in due time he must then plead in bar." The examples here given however may be said not to reach the case; that of alien enemy certainly does; but *Chitty* does not leave the subject in doubt; for in page 445, he lays down the true criterion which distinguishes a plea in abatement from a plea in bar,—“where the subject matter of the plea tends to shew that the plaintiff cannot maintain any action,” it should be pleaded in bar, and not in abatement. Therefore where the action is by an administrator stating a grant of administration from a bishop of a particular diocese, a plea of *bona notabilia* should be in bar and not in abatement; because it shews that the plaintiff has no right to sue at all in the character of administrator: so here, the plea was intended to shew that the plaintiff could not sue in the character of commissioner. It is not intended to give any opinion on the form of the plea, for that is not before us.

If however the judge thought proper to strike it out, he certainly had a right to exercise a discretion as to giving further time to plead. This discretion must, from the very nature of things be invested in every judge. If a plea is frivolous or is intended only for the purpose of delay, no such indulgence should be granted; but where the attorney seriously intended it to be tried, and for any defect in form or otherwise it is

stricken out, it certainly would be injustice to the rights of parties to refuse further time to plead; and on all these circumstances the presiding judge must be best qualified to decide.

Here an issue was tendered; if informally, the plaintiff might have demurred.

The motion is refused.

Henry & Earle, for the motion.

Davis, contra.

GARLAND HINCHY vs. JOHN FOSTER.

To an action of assumpsit, defendant pleaded a tender before action, viz: on the 6th March 1823; and the plaintiff replied that his writ was sued out on the first Monday after the fourth Monday in October, 1822. The defendant rejoined that the tender was made before suit brought. Held that plaintiff's replication must be taken as true, and that defendant's plea ought not to have been allowed, without showing that he tendered costs also.

Tried before Judge Gaillard, at Lancaster spring term, 1825.

This was an action of assumpsit, to which the defendant pleaded that he had tendered the sum due before the commencement of the action; to-wit: on the sixth day of March, 1823. The plaintiff replied that his writ was sued out, the first Monday after the fourth Monday in October, 1822. The defendant in his rejoinder does not deny the truth of the replication, but merely states that the tender was made before the suing forth the original writ. Under this state of pleadings, the jury under the direction of the presiding judge found a verdict for the defendant. And this was a motion for a new trial, on the ground that the verdict was contrary to law.

NORR, J.—The defendant pleaded a tender on the sixth of March, 1823. The plaintiff replies a writ sued out the first Monday after the fourth Monday in October, preceding. That allegation is not denied by the rejoinder. It must therefore be taken as true, and if true, then the defendant's

plea ought not to have been allowed, without shewing that he had tendered or offered to pay the costs also.

The motion must therefore be granted.

Mills, for the motion.

Williams & Clinton, contra.

GEORGE MILLER, Assignee vs. WM. BAGWELL and others.

Where a defendant was taken under a bail writ, and the sheriff, by mistake took a bond for the prison bounds, stating defendants imprisonment to have been under a *ca. sa.* the court held the bond void, and that the defendant was not estopped to shew that there was no *ca. sa.*

A recital to amount to an estoppel, must come from the party to be estopped, and not from the opposite side.

What cases amount to an estoppel and what not.

To debt on a bond against the securities for the prison bounds, defendants pleaded performance generally, and replication that the defendant did not render in a schedule, &c. according to the condition of the bond, a rejoinder that the securities surrendered the principal to the sheriff, who received him, and discharged them, was held ill, and not a good answer to plaintiff's replication.

The securities to a prison bounds bond cannot discharge themselves by a surrender of their principal to the sheriff.

It is no defence to an action against the securities on a prison bounds bond, that property of the defendant had been sold under a *fi. fa.* for the plaintiff may take out both a *fi. fa.* and *ca. sa.* at the same time, provided he proceed but upon one.

But a levy is *prima facie* evidence of satisfaction; and where a *ca. sa.* was executed but four days after a levy, before it was possible the levy could have been disposed of, it was held, that all the proceedings under the *ca. sa.* were void.

Where a bond is given for the prison bounds, and the debtor remains within the rules forty days, without rendering his schedule, and is then committed to the jail, the securities are not thereby discharged from liability on the bond; but the plaintiff has the double security of the bond, and the confinement of the defendant.

Tried before judge Richardson, at Spartanburg, fall term, 1825.

This was an action of debt brought by the plaintiff, as assignee of the sheriff of Spartanburg, against Muse Tollison

(since deceased) and the present defendants, his securities, on a bond given to the sheriff, under the prison bounds act. The defendants in addition to the general issue pleaded several pleas in bar.

First, they cravedoyer of the bond, which bore date the 14th of January, 1823, and set it out verbatim, with the condition, which was in these words, viz: "the condition of the above obligation is such that if the above bound Muse Tollison, who is in custody of the aforesaid Thomas Poole, by virtue of a writ of *capias ad satisfaciendum*, at the suit of George Miller, shall remain within the rules, bounds and limits of the jail of Spartanburg district, as established by law, and also within forty days render to the clerk of the court of common pleas in the district of Spartanburg, aforesaid, a schedule on oath or affirmation of his whole estate, or of so much thereof as will satisfy the sum due on the aforesaid writ of *capias ad satisfaciendum*, by force of which he stands confined, then the above obligation to be void and of no effect, else to remain in full force and virtue," and pleaded performance generally; to which plea the plaintiff replied, assigning breaches, and issue was taken.

The *second* special plea in bar was, "that the plaintiff ought not to have or maintain his aforesaid action thereof against the said defendants, because they say that the said Muse Tollison was not in custody of the said Thomas Poole, sheriff as aforesaid, by virtue of a writ of *capias ad satisfaciendum*, at the suit of George Miller, and that no *capias ad satisfaciendum* ever issued out of the court of common pleas against the said Muse Tollison at the suit of the said George Miller, as set forth in the condition of the said writing obligatory in the said first plea mentioned and set out, as according to law there ought to have been," with a verification and prayer of judgment.

To this plea the plaintiff demurred generally, and the defendants joined in demurrer.

The *third* special plea was *actio non*, &c. "because they say that after the execution of the said supposed writing obligatory, to-wit, on the 21st day of January in the year of our Lord one thousand eight hundred and twenty three. Muse Tollison the principal was delivered up and surrendered to Thomas Poole, sheriff of Spartanborg district the obligee of the said writing obligatory, in discharge of these defendants, (his securities) who accepted and received the said Muse, whereby the said defendants were released and discharged from any further liability under the said supposed writing obligatory," with a verification and prayer of judgment.

To this plea there was a general demurrer and joinder in demurrer.

The *fourth* special plea was *actio non*, &c. "because they say that on the 10th day of January 1823 the goods and chattels, lands and tenements and real estate of the said Muse was levied on by virtue of a *fiери facias*, in favour of the said plaintiff, and sold by the said Thomas Poole, sheriff as aforesaid, on the 1st Monday in February next ensuing, by virtue of said levy and execution, at the instance of the said plaintiff," with a verification and prayer of judgment.

To this plea there was also a general demurrer and joinder in demurrer.

The *fifth* special plea was *actio non*, &c. "because they say that after the execution of the said supposed writing obligatory, to-wit, on the fifth day of May in the year of our Lord, one thousand eight hundred and twenty three, the body of Muse Tollison the principal was confined in the jail of Spartanburg district, in the custody of Thomas Poole, sheriff as aforesaid, at the instance of the said George Miller, for the debt aforesaid," with a verification and prayer of judgment.

To this plea there was also a general demurrer and joinder in demurrer.

The case was heard on the demurrers only: And at the hearing the presiding judge overruled the demurrers to the second and fifth pleas. on which he gave judgment for the

defendants: And sustained the demurrers to the third and fourth pleas, on which he gave judgment for the plaintiff.

Both parties appealed from the decision of his honour on the circuit. The plaintiff's council moved to reverse the decision, and to set aside the judgment for the defendants on the demurrer to the *second* and *fifth* special pleas, and the defendants counsel, moved to reverse the decision, and to set aside the judgment for the plaintiff on the demurrer to the *third* and *fourth* special pleas.

Waddy Thompson, for the motion,—Cited *Stoney vs. J. Neill*, 1 *M'Cord* 85, a party cannot aver against his own bond or deed. (*Willes* 9. *Cro. Eliz.* 587.) The sheriff had no right to receive him upon surrender, because it was against the condition of the bond. They had no right to surrender, for giving the bond is a privilege to the debtor. (1 *M'Cord* 578. 4 *Johnson Rep.* 407.)

Irby contra.—This was intended as a bail bond, and made a prison bounds bond by mistake. (2 *Brevard* 161. 2 *Bay* 208. The *ca. sa.* was the consideration of the bond.

Davis—Cited *Hayne vs. Maltby*, (3 *Term. Rep.* 438.) The sheriff had the right to receive the defendant, when surrendered, but he could not have been compelled to do it. Did they not surrender him at their own accord? He accepted him then at their request.

Earle, in reply.—The court will presume that he was in lawful custody. But he may rebut that. He does not plead that he was not in lawful custody, but that there was no *ca. sa.* A party may acknowledge himself in custody without a *ca. sa.* He does not allege any pretence, &c. (*Willes* 25. *Cro. Eliz.* 757.)

Norr, J.—This case was brought before the circuit judge upon several pleas and demurrers, all of which are now submitted to this court. The demurrers to the second plea was overruled by the judge below; and a motion is now made to reverse the decision. It must be admitted that the only evidence of authority upon which the sheriff could exact, the

bond in question, from the principal obligor, would be a writ of *capias aut satisfaciendum*. Such a writ would have authorized him to have confined him within the four walls of the jail, and therefore authorized the taking of the bond. I say that is the only evidence, because the sheriff having held that as the authority upon which he proceeded, he could not justify himself, by the adduction of any other. The bond was therefore given to save the defendant from actual imprisonment. A bond exacted by any individual under similar circumstances, would have been voidable on the ground of duress. But taken by a public officer, under the garb of legal authority, it was not only voidable, but it was an act of oppression, which ought to subject the officer to the severest animadversions of the law. It is no excuse, to say that it was done through ignorance, or inadvertence. The law has too great a regard for the liberty of its citizens, to suffer it to be violated with impunity, by the ignorance or carelessness of its agents. If, therefore, the facts stated in the plea are true, "that he was not in custody by virtue of a *ca. sa.* and that no such *ca. sa.* had ever issued against him," and the demurrer admits them to be true, the sheriff acted without authority. The bond is therefore void, and the defendants are entitled to the benefit of their pleas. It would be strange, passing strange, indeed it would be a reproach to our law if it were otherwise. The ground which is taken in support of the demurrer, is that the defendants are estopped, by the recital in the condition of the bond, from alleging that there was no *ca. sa.* This principle is attempted to be supported by the cases of *Shelley and Wright*, *Willes* 9. *Cossens and Cossens*, *Do.* 25. and *Willoughby and Brocks*, *Cro. Eliz.* 556-7. But these cases do not support the doctrine. It is a general rule of law and a correct one too, that a man cannot aver against his own deed. But that is where he has alleged some particular fact within his own knowledge, and which forms a part of the consideration for his undertaking, and that is the whole extent to which the cases relied on go. But the

principle cannot be extended to an allegation coming from the other party, and which can necessarily be known only to him, although contained in the recital of a deed made by the defendant. In the case of *Hayne vs. Mulby*, 3 D. and E. 438, it appears that the defendant had purchased the privilege of using a certain patent machine from the pretended patentee. He had entered into certain covenants reciting the right of the plaintiff to the patent and obliging himself to employ the machine, with certain restrictions. This was an action for a breach of some of those covenants. The defendant pleaded among other things that the plaintiff had no right. The plaintiff demurred, as in this case, on the ground that the defendant was estopped by his deed from putting that matter in issue. Lord *Kenyon* said, "now in point of conscience it is impossible that two persons can entertain different ideas upon the subject. But it is said that though conscience fails, the defendant is estopped in point of law from saying that the plaintiff had no privilege to confer. But the doctrine of estoppel is not applicable here. The person supposed to be estopped is the very person imposed upon." (3 D. and E. 438.) Does not every word of that learned judge apply to this case. The plaintiff a public officer, pretending to be clothed with legal authority, arrests the defendant, and is about to throw him into jail. He resorts to the only refuge which the law affords, which was the bond in question, and which we must presume was dictated by the sheriff himself; for the defendant could have had no hand in making the terms. And now because he has introduced into it an allegation that he had a *ca. sa.* which authorized the proceeding (although he admits the allegation to be false) he contends that the person thus imposed upon and oppressed is estopped from denying it; for it is to be observed that this is an allegation coming from the sheriff and not from the defendant. He could not find under what authority the sheriff acted, but by his own representation. A person is only estopped from doing his own acts, but not

the acts of another. If a man sell land to which he has no title, and afterwards acquire a title, he shall be estopped by his deed from disputing the title which he has made. (a) If a person enters into a covenant, to pay for personal property, the possession of which he acknowledges to have received, he will be estopped to deny the receipt of it, because it is a fact which he must have known, and has admitted. But if he recite in the same instrument that it was the property of the vendor, he may, nevertheless shew that the vendor had no title: because it would be apparent that it was an allegation founded upon the representation coming from him, the truth of which the vendor could not know, and cannot be supposed to admit by such recital. The distinction therefore between those recitals which do, and those which do not, amount to estoppels, I think is apparent. A public officer might shelter himself from the grossest acts of oppression if such a subterfuge were to be allowed. I am of opinion therefore, that the demurrer ought to be overruled, and that the decision of the circuit court must be reversed. It is therefore unnecessary, for the purpose of deciding this case, to go into a consideration of the other question submitted to the court. But as the counsel are of opinion that a decision on the other points of the case may become important, in other questions which will probably grow out of this transaction, I will proceed to express the opinion of the court on the other points also.

Before I proceed to consider the third plea, as it is called, I must take occasion to remark, that I do not think the proceedings in this case exhibit the best possible specimen of special pleading. The defendant in the first instance pleaded performance generally, to which the plaintiff replied, assigning as a breach that the defendant, Muse Tollison, did not render in a schedule &c. according to the condition of his bond. This plea must be taken, therefore, as a rejoinder to that replication and not a plea in bar to the declaration. The question then is, whether it is a good answer to the plain-

(a) See the case of *Reeder vs. Craig*, ante. 411.

tiff's replication. I do not think that it is. The defendant was in custody on a *ca. sa* ; on the 14th of January, he entered into this bond by which he became entitled to the prison rules. That was a privilege allowed him by law: and it was one of which he could not be deprived, but by failing to perform the condition of the bond. His securities had not stipulated that they should be at liberty to surrender him to the sheriff. Their undertaking was, that he should remain within the prison rules, and should within forty days render in a schedule of his property &c. yet by their own act they deprive him of the power of performing the duty which they had undertaken that he should perform, by throwing him again into jail, within a eleven days after they had entered into this covenant. If it had been the act of the plaintiff, they probably would have been exonerated. But they can derive no protection from their own unlawful act. It was no excuse to say he was accepted by the sheriff. For he equally acted in violation of his duty. It has already been remarked that he was entitled by law to the benefit of the prison rules, a privilege of which he could not be deprived even with the consent of the sheriff himself.

I am of opinion therefore that the demurrer to this plea ought to be sustained.

With regard to the fourth plea, I think that the demurrer ought to be overruled. It is now a very well settled rule of law in this State, that a party may take out both a *fi. fa.* and a *ca. sa.* at the same time; but he can proceed but upon one. (*State vs. Guignard*, 1 *M'Cord*, 176.) The execution of one supercedes the other, and for the most obvious reasons; taking the body on a *ca. sa.* is in contemplation of of law a satisfaction of the debt; to proceed with a *fi. fa.* after the execution of a *ca. sa.* would be taking a double satisfaction. There are indeed exceptions to this rule. But the party must shew by his pleading, that he comes within one of those exceptions. He cannot have the benefit of it on a demurrer. The same rule is applicable to a *fi. fa.* A levy is *pri-*

ma facie evidence of satisfaction; (2 *Bacon, tit. exon. D.*) And in this case it appears that the *ca. sa.* was executed four days after the levy of the *fi. fu.* and before a sale under it could have been effected; all the proceedings therefore under the *ca. sa.* were illegal and void.

I think the demurrer to the last plea was properly sustained. The act provides, that any person committed on execution as aforesaid, who shall not give in such schedule agreeably to the tenor of his bond, shall not be any longer entitled to the benefit of the prison rules, but his bond shall be forfeited, and assigned to the plaintiff. Allowing a person the benefit of the prison rules does not amount to a discharge. It is nothing more than the enlargement of the jail. The plaintiff therefore has the double security of the bond and the confinement of the defendant within the prison rules, until the forty days shall have expired. At the expiration of that period the defendant loses the benefit of the rules, if he does not perform the condition of his bond. And the plaintiff still retains the double security which he had, and the defendant is not entitled to his discharge until the debt is paid. The decision of the circuit court is therefore supported or reversed accordingly as it comports with this opinion.

W. Thompson & Earle, for the plaintiffs.

Irby & Davis, for defendants.

CREYTON & SLOAN vs. NELSON DICKERSON.

Where an application is made before the clerk of the court, as commissioner of special bail, during the sitting of the court, to discharge a prisoner, under the prison bonds act, and the clerk is too busy to attend to it, the court itself may hear the motion, their jurisdictions being concurrent.

The payment of a debt on the day a defendant is arrested, is not such an *undue preference* of one creditor to another as will deprive the defendant of the benefit of the prison bounds act, although the property assigned was not sufficient to pay plaintiff's debt.

The payment must be accompanied with a purpose of preferring one creditor to the injury of another.

Where fraud is alleged against a party swearing out, the judge may either submit the matter, if the facts be complicated, to a jury, or he may decide them himself.

Explanation of the case of *Stover vs. Duren*, (2 *M'Cord*, 266.)

Tried at Greenville, fall term, 1824, before judge Gantt.

The defendant in this case was in execution by virtue of a *capias ad satisfaciendum*, at the suit of the plaintiff, had given bonds for the prison bounds, and had rendered a schedule of his estate to the clerk of the court, who had given the usual notice that he would be liberated in ten days, unless cause was shown to the contrary. The ten days expired on the first day of the court. The plaintiffs demanded further time to obtain information to enable them to contest the schedule or otherwise oppose the discharge of the defendant, which the clerk granted, and appointed the following Saturday for the hearing, before himself. On Friday the defendant made an application in open court for his discharge, which the presiding judge then refused to hear. On Saturday at 12 o'clock, A. M. (the court being still in session) the plaintiffs by their attorney applied to the clerk, and informed him that they were ready to show cause against the discharge of the defendant. The clerk refused to leave court, but proposed to hear the cause after adjournment. When the juries were dismissed, the defendant renewed the application for his discharge in open court. The plaintiff's attorney objected, that under the circumstances, the court had no jurisdiction of

the matter; But that he was prepared to shew cause. The presiding judge proceeded without a jury to hear the evidence; when the plaintiffs proved that on the day of his arrest the defendant had paid another debt of between twenty and thirty dollars, and on that ground opposed his discharge; as the property contained in his schedule did not satisfy the execution of the plaintiff on which he was committed.

His honour considered the cause as insufficient and ordered the defendant to be discharged and the property assigned.

A motion was now made on the part of the plaintiff, to reverse the decision, and to set aside the order of the presiding judge, on the following grounds:

1st. That as the application was first made to the clerk of the court as commissioner of special bail, who had ample authority, and the cause was still pending before him, the court had no legal jurisdiction of the matter.

2nd. That the cause was sufficient to prevent the discharge of the defendant, whether there was any fraud intended or not, and his honour erred in ordering him to be liberated.

3rd. The cause should have been submitted to a jury.

COLCOCK, J.—By the act (after the public notice) the authority to discharge is given either to the judge or the commissioner of special bail, and as the clerk could not leave the court while it was in session, it is not perceived that there was either impropriety or illegality in the course pursued by the presiding judge. On the contrary, as the liberty of the citizen was restrained, it was highly proper that the judge should hear the application. The jurisdiction was concurrent and the application could not well have been refused.

On the second ground the court are unanimously of opinion that the plaintiff cannot succeed. The seventh clause of the act enumerates the causes which shall prevent the discharge of the prisoner. First, his not giving in a schedule within the forty days, nor shall he be discharged

without fully satisfying the action or execution on which he is confined, if since his confinement and before security given he has been seen without the prison walls, without being legally authorized to do so, or shall have spent more than 2s. and 6d. per day; or if confined on account of wilful mayhem or wilful and malicious trespass, or for voluntary or permissive waste, or damages done to the freehold, or shall have within three months before his confinement, or at any time since, paid or assigned his estate or any part thereof to one creditor in *preference* to another, or fraudulently sold, conveyed or assigned his estate to defraud his creditors.

In the seventh clause, speaking of the *preference* which it is intended to prevent, the words are "an undue preference to one creditor to the prejudice of the plaintiff."

It is then clear both from the letter and spirit of the act that it was never intended that the *mere payment* of a sum of money to a creditor should prevent the discharge of an unfortunate debtor. The payment of the money must be accompanied with a purpose of preferring one to the injury of another. Suppose a man to be in debt and to have executions against him of which he is not informed, he is making use of the best means in his power to pay off his debts and as soon as he procures a small sum pays it to a creditor who like himself may be in distress, and soon after he is apprehended by one of his creditors, can it be imagined that for such an act he is to lose his liberty? Again, suppose he contracts a small debt for those necessities which are indispensable to support his family, and a few days before his arrest or even on the very morning of it he discharges such a debt, shall he be subjected to so severe a penalty? I apprehend not. To give to the act such a construction would be to place an unfortunate man, against whom there was a judgment in a worse situation than if he were in actual confinement; for he could not venture to make a payment lest he should be immediately laid hold of and imprisoned for life.

The preamble of the act states that, "Whereas humanity requires that the confinement of persons on civil process should be less rigorous than it has hitherto been. Therefore it is enacted, &c." The object was to ameliorate the condition of unfortunate debtors and not to subject them to the extreme rigor which the construction contended for would make them liable to.

The third ground complains that the case was not submitted to a jury. The practice under the seventh clause has been, where the facts were complicated or of doubtful character, to refer them to a jury, but the judge may, when he thinks there is no necessity for the trouble and expense of a jury, decide on a case alone; and it is difficult to see what necessity there could be for a jury in a case like this. The single fact of his having paid a sum of money was not controvertible. No evidence was given to induce a belief that the money was paid with any unlawful purposes, and therefore no room for a doubt as to the fact, and the conclusion of law would under any circumstances have been for the judge. The case of *Stover vs. Duren*, (2 *McCord* 266,) was much relied on by the counsel for the plaintiff. But it has certainly been misunderstood. There the case was submitted to a jury and the judge who charged the jury stated that the omission to render the schedule and the preference must be both fraudulent, which it was contended induced the jury to suppose that something like moral fraud was necessary; whereas the condition of the bond is merely that he render a schedule, and the requisite of the act in the other particular, that he prefer one creditor to another; either of which prevents his discharge. Now he had not rendered the schedule within the time, and no reason was given for the neglect. It was, therefore, necessary that the case should go back, and the judge who delivered the opinion of the court preserves the word used in the act, "*prefer*;" and when he says such preference need not be fraudulent, he is to be understood as meaning that it is not necessary that it be considered as

morally so, speaking with reference to the charge of the presiding judge in that particular case.

The motion is dismissed.

Earle for the motion.

Thompson contra.

THE STATE vs. GEORGE FOSTER.

All indictments upon statutes must state all the circumstances which constitute the definition of the offence in the act, so as to bring the defendant precisely within it.

A conclusion "contrary to the form of the statute, &c." will not aid the defective statement of the crime. Not even the fullest description of the offence, even in the terms of a legal definition, will be sufficient, without keeping close to the expressions of the statute.

The forgery of a receipt for a note, is not such a forgery as is indictable under the act of 1801, similar to the statute 2 Geo. II. ch. 25; which only punishes the forgery of a receipt for money or goods.

To bring the indictment within that act, it must state the receipt to have been either for goods or money.

The person whose receipt was so forged is a competent witness; more especially as all the matters between the parties, to which the receipt related, were already settled.

A record of a judgment, under an award, between the prisoner and the prosecutor, was held competent evidence, to shew that all matters in dispute between the parties had been settled, to which the receipt forged related, to shew the prosecutor had no interest.

This was an indictment for forgery, tried at Union, before judge Gaillard. The indictment stated it to be contrary to the statute. The forgery committed, was the alteration of the date of a receipt given by the prosecutor W. H. Cotter to the prisoner. The receipt was in the following words: "May 25, 1820." (changed from 1822. the 2 was stricken out and 0 inserted.) "Received of Jas. Foster, Esq. his note for \$96 84, balance in full of book account until the 1st. January last. Wit: my pen and seal. (signed) W. H. Cotter." The date was changed from 1822, to 1820. The prosecutor and the prisoner had some matters of

accounts between them, and disputing about them, referred their accounts to arbitrators. This receipt was rejected by the arbitrators, on account of the change of the date, and its having been given for a matter settled some time before and not involved in their present accounts submitted to arbitration. At the trial all matters between the prosecutor and prisoner had been settled, under the award of the arbitrators, which was in favor of the prosecutor, after rejecting this receipt.

Mr. *O'Neal* for the prisoner objected to W. H. Cotter's being examined as a witness, on the ground that he was incompetent on account of interest, the receipt being against him. The court overruled the objection, and he was admitted as a witness. Mr. *O'Neal*, also objected to the arraignment of the prisoner, on the ground that the instrument charged to have been forged, was not within the provisions of the act of assembly, which was a transcript of the statute 2 *Geo. II. ch. 25*, which is held not to apply even to bank notes. (1 *Leach*. 182.) The receipt was neither for *money* or *goods*. (3 *Chitty's Crim. L.* 1032. 1 *M'Cord*, 454, 1 *Bay* 207. 2 *East*. 926)

This objection, was also overruled, and the jury found the prisoner guilty.

This was a motion, in arrest of judgment, on the following grounds:

1st. That the forgery charged to have been committed contrary to the act of the general assembly, in that case made and provided is not a forgery under the provisions of any act of the general assembly of this state.

2nd. Because the forgery of the instrument for which the defendant is indicted, is not an offence against the act of the general assembly, but is an offence at common law.

And for a new trial on the grounds:

1st. Because the presiding judge permitted the prosecutor William H. Cotter, and the party who made the receipt

alleged to have been forged, to be examined as a witness for the prosecution.

2nd. Because his honour permitted the record of a suit in the court of common pleas between George J. Foster, plaintiff, and William H. Cotter, defendant, to be given in evidence.

COLCOCK, J.—In framing indictments the law requires the greatest certainty. For this purpose, the charge must contain a certain description of the crime of which the defendant is accused, and a statement of those facts by which it is constituted; and this is said to be necessary, that the grand jury may clearly understand what is the offence charged, that the defendant may know what crime he is called upon to answer, and thereby be enabled to determine whether the evidence supports the charge, that the court may see a definite offence, and be enabled to apply the proper punishment, and lastly that the defendants conviction or acquittal may ensure his subsequent protection, by enabling him to plead it in bar to any subsequent prosecution for the same offence. The certainty essential to the charge consists in two parts, the matter to be charged and the manner of charging it. (1 *Chitty Crim. Law* 169.) And it is a general rule, that all indictments upon statutes, especially the most penal, must state all the circumstances which constitute the definition of the offence in the act, so as to bring the defendant precisely within it. And this rule applies as well to those which take away the benefit of clergy from offences which exist at the common law, as to those by which new felonies are created; and a conclusion, “contrary to the form of the statute, &c.” will not aid a defect in this respect; and not even the fullest description of the offence, were it even in the terms of a legal definition would be sufficient without keeping close to the expressions of the statute. (1 *Chitty id.*) According to these rules it is clear that the prisoner must succeed on the first grounds in arrest of judgment.

It is attempted to support the charge as one against the act of 1801 making it a capital offence to forge or alter the instruments therein enumerated; among which are receipts for money and receipts for goods. Now to have brought the offence within the act it should have been alleged in the indictment that this was a receipt for money or goods. Upon its face it is neither the one or the other; that is, it is not a receipt for money, nor a receipt for goods, (*eo nomine.*) If it had been intended to consider it as such there should have been proper averments and innuendoes to shew that it was so, or might be so, considered. The indictment does no more than charge the forgery of the instrument, in words, letters, figures and ciphers following; then follows the receipt which is for a note of hand for \$96,84, for balance of book account, which makes it an indictment at the common law. The concluding words contrary to the statute, &c. as we have before seen, do not give character to the offence, and may be stricken out as surplussage. The charge cannot then be supported as a statutory offence, though it may be a common law offence.

I now proceed to examine the grounds for a new trial. The first of which is that the prosecutor W. H. Cotter who gave the receipt was admitted as a competent witness to prove the forgery. The English rule on this subject has been acquiesced in. In Massachusetts and Pennsylvania, a contrary doctrine has been established. (1 *Mass. Rep.* 7. 3 *Do.* 83. 1 *Dallas* 110. 2 *Do.* 239.) Mr. Day considers the law as unsettled in Connecticut. I do not know of any case in which the point has lately been decided here. Chancellor *Kent* while chief justice in New York, in commenting on a case said to have been decided by that court in the year 1794, very properly remarks, that latterly the question of interest had been investigated and defined with more precision both in England and America. The rule (he says) now is, in all such cases, and I believe I may say in all criminal cases, that the witness is to be received if he

be not interested in the event of the suit, so that the verdict could be given in evidence in an action in which he was a party. The interest the witness may have in the question put, is no longer the test. The degree of interest goes only to the credit of the witness. The exclusion of the witness in the case of forgery has therefore now become an anomaly in the law of evidence; for it is certain that the conviction of the party charged with forging a paper cannot be given in evidence in a subsequent suit on that paper; and as the reason of the old rule has ceased by a sounder definition of the question of interest, and as it is not now applied to other criminal cases, it would seem to be fit and proper that the rule itself should no longer be applied to the case of forgery. But the case before us is within the British rule, for the witness had no interest in the paper, it had done its office. The note for which it had been given was paid and also the matters between the parties to a subsequent period had been settled; he was therefore competent. And this brings me to the second ground, that the record should not have been given in evidence, because it was not a record between the same parties. viz: These two questions elucidate each other, It is not necessary to decide how this record might be considered as evidence. For the purpose for which it was introduced, it certainly was admissible. Now, as to the question of interest which the witness had in the receipt, it certainly was a question between the parties, witness and prosecutor, who were the parties to the record, and who had an opportunity of cross examining witnesses, and a right to appeal. But a record, like any other writing, may be produced to prove a collateral fact, as was the case in this instance. It was produced to shew that all matters were settled between the parties and that the receipt had not been taken into the account. Why, the record did not state. So that the objection that it was used to show that the arbitrators considered it a forgery, could not have been founded on the record, but must have proceeded from what the arbitrators themselves said. The

prisoner had contended that Cotter was an interested witness. The state was then called on to shew that he could have no possible interest in the receipt. This record proved the fact, As to the last ground taken for a new trial; that the verdict was against the evidence, the motion must fail; for there certainly was sufficient evidence, if the jury believed the witnesses; and there does not appear any sound reason, why they should not have done so.

The motion for a new trial is refused. The judgment is arrested so far as the indictment professes to charge a statutory offence, and the prisoner is remanded to receive the sentence of the common law. (*a.*)

O'Neal and Sims for the motion.

Pearson, Sol. contra.

N. UNDERWOOD vs. WILLIAM JACOBS.

Where a purchaser, under sheriff sale, refuses to comply with his bid and the sheriff goes out of office, his successor cannot bring an action for a breach of the contract.

No privity exists between a sheriff and his successor, but what is created by statute; and it has never yet been extended to actions accruing to the predecessor, by contract, tort, or any other cause.

Quere? Whether a purchaser at sheriff sale, who does not comply with his contract, should be sued by the sheriff, or by the person whose property is sold?

Tried before judge Richardson, at Greenville, fall term, 1825.

The defendant had bid off a tract of land sold by A. Crowder, the former sheriff of Greenville district, and refused to comply with the terms of sale. The land was resold by Crowder, at the risk of the defendant, and purchased by another person for a less sum than he had bid at the first sale. This action was brought by the plaintiff as successor in office

(*a.*) See the case of the *King vs. Froud*, 1 *Brod. and Bing.* 300, where it was held a forgery, although no such person existed as the individual purporting to have drawn the order. R.

of Crowder, to recover the difference between the first and second sale.

The defendant demurred to the declaration, on the ground that if any action had accrued to Crowder, it had not passed to his successor in office.

The presiding judge sustained the demurrer. And this was a motion to reverse that decision, on the ground, that the land was sold by Crowder in the character of sheriff, and therefore the right to consummate the sale and all other incidents of the sale passed to his successor.

Waddy Thompson, for the motion. The vendue law applies to sheriff sales. 1 *M'Cord* 197. 1 *Equity Reports* 142. 2 *Bay* 169. Suppose the land had been resold by the plaintiff, who must have brought this action?

Earle, contra. Is this a contract? If so, the contract was with the predecessor. A sheriff could not even execute titles for his predecessor, until he was authorized by act of assembly. A sheriff at common law might perfect a sale at common law when he had made a levy. The defendant whose property is sold never will sue, because he will always collude with the bidder.

Norr, J.—Whether Crowder himself could have maintained this action is a question which it is not now necessary to decide. But it would seem to me that if a cause of action accrued to any body, it must have been to the party whose land has been sold as he is the only person injured. However on that question, I shall express no opinion. If Crowder had any cause of action it must have been on the ground of contract. The promise was made to him and could not by operation of law pass to his successor, there being no promise either express or implied to him. At common law whatever official act the sheriff had begun, he was required to go on and perfect. If he had made a levy it was his duty to sell, make titles, &c. The right of his successor to consummate what he had begun, is derived from a special act of the legislature for that purpose. But it does not extend to actions ac-

cruing to him by contract, tort, or any other cause. There is no privity between the plaintiff and defendant, nor any consideration on which an action could accrue to him. The court therefore concur in opinion with the presiding judge.

Waddy Thompson, for the motion.

Earle, contra.

The Administrators of WM. JOHNSON vs. JAMES C. VREAL.

Under a general warranty of title, in this state, the purchaser may maintain an action against the grantor, before eviction, if he can shew that he had no title at the time of sale (a.)

But such a general warranty of title has the effect of a *special warranty of seisen*; as no action can be maintained upon a covenant for *quiet enjoyment* until eviction.

In case the warranty constitutes a covenant of *seisen*, it is broke as soon as made, if the grantor has no title; and the statute of limitations will commence from the date.

If the warranty constitutes a covenant for *quiet enjoyment* only, then the statute will not commence to run until eviction.

Tried before Judge Gantt, at Union Spring term, 1825.

This was an action of covenant upon a warranty of the title to a tract of land. The deed contained a general warranty of the title to the land only. The defendant in addition to several other pleas pleaded the statute of limitations. The jury found a verdict for the defendant, and this was a motion for a new trial.

NOTT, J.—Several questions arose in the progress of this cause which are now made the grounds for a new trial. But the only question which it has become necessary to decide, is whether the action was barred by the statute of limitations? The deed upon which the action is founded bears date the 14th of April 1807. It does not appear by the report when the action was commenced; but it must have been

(a.) See *Mackey vs. Collins*, 2 Nott and McCord 186, and *Furman vs. Elmore*, Do. 189. R.

more than ten years after that time. By the early decisions of our courts it has been held that under a general warranty of title the purchaser may maintain an action against the grantor before eviction if he can shew that he had no title at the time of sale. That question has been so often decided and the rule so long acted upon, that it is now received as the settled law of the land.

Those decisions cannot however be maintained without giving to a general warranty of title the effect of a special warranty of *seisen*. For I consider it a settled rule of the English law that an action cannot be maintained for the breach of a general warranty of title for quiet enjoyment until after eviction. (*Shepperds Touchstone* 170. 3 *Saunders* 178, notes (7,) (8.) 3 *Term. Rep.* 584, *Dudley vs. Folliott*. 14. *Johnson* 253, *Abbott vs. Allen*. 2 *Do.* 123, *Vanducan vs. Vanducan*. *Do.* 4, *Kelley vs. Wilcox*.) If this covenant is to be construed a covenant, of *seisen*, then it was broke as soon as it was made, if plaintiffs intestate had no title. (*Shepperds Touchstone* 170. 2 *Johnson* 4, *Kelley vs. Wilcox*.) The cause of action therefore accrued at that time, and the action was barred by the statute long before the action was brought. If is to be considered as a covenant for quiet enjoyment, the plaintiffs have no cause of action, because there has been no eviction, and they have not been disturbed in their possession.

The motion therefore is refused.

Herndon for the motion.

Thomson contra.

GIBSON vs. JOHN TAYLOR.

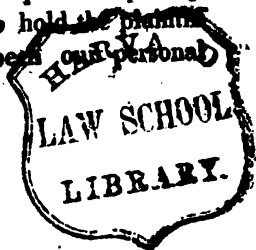
By the act of 1824, the statute of limitations shall not hereafter be construed to defeat the rights of minors, when the statute has not barred the right in the life time of the ancestor, before the accrual of the right of the minor.

This case involves the two following questions:

1st. Whether the operation of the statute of limitations was suspended by the death of plaintiff's ancestor, who died during his minority, or whether having commenced previous to the death of the ancestor, it still ran on notwithstanding such dissability? This question first occurred in the case of *Rose & Daniel*, (2 *Const. Rep. Treadway*, Ed. 549.)

In that case it was decided, that, although, the statute had commenced its course against the ancestor, it was nevertheless arrested by his death, and that the heir had five years after having arrived at the age of maturity to commence his action. The question again arose in the case of *Faysoux & Prather*, 1 *N. & M'C.* 296, in which it was held that under similar circumstances the heir was barred notwithstanding his minority. The law thus remaining unsettled, this case and the case of *Rose & Daniel*, were again brought up and the question a third time submitted to the consideration of the court. The judges being equally divided the question has hitherto remained undecided. The legislature however at its last session 1824, passed an act upon the subject, in which it is declared "that the statute of limitations shall not hereafter be construed to defeat the rights of minors, where the statute has not barred the right in the life time of the ancestor, before the accrual of the right of the minor."

In general, acts of the legislature are considered as operating only prospectively; but this question has already been decided by a full bench, in conformity with the provisions of that act. Since that time the court has been equally divided upon it. And the late act has been passed expressly for the purpose of settling the law. To hold the plaintiff barred therefore, whatever might have been our personal



opinion of the true construction of the act, would be to decide the question directly contrary to the declared law upon the subject. And the effect of it would be to give to the act a different operation, as it regards the cases now under consideration, to that which it will have in all future cases. The court therefore feel bound to be governed by the first decision on the subject, and to hold the plaintiff entitled to maintain his action.

But we are of opinion that the circumstances of the case authorized the jury to presume a title from the ancestor in his life time. And the motion for a new trial is therefore refused.

Miller for the motion.

Blanding contra.

ISAAC BARINO vs. WM. M'GEE.

The rule still prevails, as to *personal* property, that when the statute of limitations begins to run, it will run on notwithstanding any intervening disabilities. (a.)

And where an action of trover was brought before the expiration of four years, and continued over until after the four years, and then the plaintiff was nonsuited, upon a second action being brought, the court, held that the plaintiff was barred by the statute.

This was an action of trover for a negro, commenced the 21st day of September 1822. The defendant pleaded the statute of limitations. The plaintiff replied that the defendant was guilty of the trover and conversion within four years before the 10th day of September 1817, at which day he brought his action against the defendant, which was continued in the court by divers continuances to March term, 1822, when he was nonsuited; and that he afterwards recom-

(a.) See *Fewell vs. Collins*, 1 *Const. Rep.* *Treadway's Ed.* 202. *Nicks vs. Martindale*, *Harper's L. R.* 135. And see the case in note, at the end of this case.

menced this action for the same trover and conversion, on the 21st day of September 1822. To this replication the defendant put in a general demurrer, to which there was a joinder, and on argument before his honor judge James, at Spring term, 1825, the demurrer was sustained.

From this judgment the plaintiff appealed and now moved the appeal court, to reverse the decision of the circuit court.

NORR, J.—The general principle which we have so often decided, that when once the statute begins to run, it will run on notwithstanding any intervening obstacles, is not denied in this case. But it is contended that as a suit was commenced and continued for several courts, the act was suspended during that period. And that as this action was commenced immediately after the nonsuit in the other, the right of action was still preserved.

It seems to be generally understood and I think must be admitted, that every case coming within the provisions of the act would have been subject to its operation, if the act itself had made no exceptions. It has therefore been held a good bar in times of rebellion, when the courts were actually shut up. (4 Bacon 480. *Lim. (E.) Hall vs. Wybourn*, 2 Salk. 420.) So it has been held a good bar though the defendant were beyond sea. (*Do.*) Because said the court the statute is general, and must work upon all cases which are not exempted by the exceptions. And the *Statute 4 and 5, An. c. 16.* was made to provide for that case. In the case of the *Maryland Ins. Comp. ads. Richards, and others*, (8 Cranch 92,) it is said that in no case of a voluntary abandonment of an action has an exception to the statute of limitations been supported, and a nonsuit must be considered as a voluntary abandonment. In *Smith vs. Brown*, (3 D. and E. 662,) it was held that an attachment of privilege was no continuance of a bill of middlesex so as to avoid the statute; which in principle is very analagous to this case. In 1 *Seargeant and Rawls' Pennsylvania Rep.* 236, the very point has been

decided. This case does not come within any of the exceptions to the act, and the court is not authorized to add one to the number provided for by the legislature. It is a little remarkable that no case is found in any of the English books involving the question. But I presume it must have been because it has been considered as coming within the principle of the cases already referred to. There is a loose note in *Willes Rep.* 355, *Forbs and wife vs. Middleton*, which bears some analogy to this. The wife, plaintiff, abated the suit by marrying, the husband and wife commenced their actions within two terms and it was held they were not barred. One of the reasons given by the court was, that the wife had brought the action as administratrix, and the court said no disability could be pleaded to an administratrix.

This is the only case which I have found, where an action, which has abated by the act of the party, has been held to prevent the operation of the statute. But if the real ground was that the plaintiff was administratrix, and the abatement of the suit by her marriage should not prejudice the estate on that account, it leaves room to infer that in any other case the bar would be effectual.

It does not however appear to me, to be a case to which much importance can be attached on either side. I am of opinion, therefore, that according to the letter of the act, as well as the uniform tenor of the decisions which have been made upon it, the decision of the court below must be supported.

There is no doubt but that particular cases may occur in which inconveniences, and perhaps apparent injustice, may result from this construction; but on the other hand there might never be an end to a suit were any other to prevail.

The motion therefore must be refused. (u)

Evans, for the motion.

Miller, contra.

(b.) *Adm'r. M'COLLOUGH vs. SPEED.*

The rule still prevails, as to personal property, that where the statute of limitations begins to run, it will run on notwithstanding any intervening disabilities.

The act of 1824, to the contrary is only confined to actions concerning lands? Where the statute has not commenced to run against the intestate or testator, during his life time, it will not run against the administrator, till administration is granted. But where it commences to run against the intestate or testator, his death will not suspend it till administration is taken out. (1)

Tried before judge James who made the following report to the appeal court:

"This suit was by summary process on a note for \$60 payable to bearer, and dated 3rd January 1820; time of payment not mentioned. Plea the statute of limitations. Demurrer and joinder. The payee M'Cullough died in September 1823, and administration was not taken out by his mother till January 8th, 1824. The suit was commenced soon after, viz: 25th February 1824—more than four years after the date of the note.

Evans for plaintiff,—Cited the case of *Administrator Kennedy vs. Edwards*, from recollection, where administration was not granted until eighteen years from the death of the intestate, and yet it was held that as no right of action had accrued during that period that the act did not attach.

Ervin produced a memorandum in writing of the same case, which he had taken, to the same effect.

Wilkins, cited the case of *Adm'r. Adamson vs. Smith*. Where it was held, that the intervening insanity of the holder of the note did not suspend the statute of limitations; which having once begun to run, at the time the action accrued, continued notwithstanding disabilities intervened. (2 *Const. Rep.* 269.) In this opinion four judges concurred.

The case of *Faysoux vs. Prather* shews that the same doctrine was held by three judges, two dissenting. (1 *Nott and M'Cord* 296.) In the case of *Robson vs. Wall*, (2 *Nott and M'Cord* 498,) it was held that war suspended the operation of the statute, between the citizens of the two countries, for the time it continued; which was adopting a part of the law of nations. From these conflicting decisions I understand the law is not yet settled and that I am at liberty to exercise my own judgment. Now, I am of opinion, that the decisions in the cases of the *Adm'r. of Adamson vs. Smith*, and of *Faysoux vs. Prather* are contrary to the whole spirit of the act of limitations, which makes express provision for many of the most obvious disabilities which occur, but could not provide for all that

(1.) See 2 *Saund.* 63, g. note. 2 *Salk.* 424. *Carth.* 335. 4 *Mod.* 372. *R.*

may arise. To have done so the act itself might have filled a volume. The law itself is a wholesome one in preventing litigation and in securing titles or rights, where papers are lost; but every one who has been long in practice must know that in the majority of cases it is a most unjust defence. The legislature has lately confined its operation, and I cannot see one good reason why I should extend it.

Where any obvious disability has occurred to prevent a creditor from suing, the debtor has no excuse, and every moral obligation will bind him to pay. Then why should I push a law beyond the boundaries of reason and good conscience to defeat this moral obligation?

For these reasons the demurrer is sustained."

NOTT, J.—The question involved in this case, appears to have been settled in the case of *Nicks vs. Martindale*, (*Harper's L. Rep.* 135; But as the judge in the court below, seems to suppose that the decisions of this court have been at variance with each other, some further consideration of the subject appears still to be necessary. It is now a rule well settled in the English courts, that when the statute of limitations has begun to run, it will continue to run on, notwithstanding any intervening disability, such as infancy coverture and the like. (*Stowel vs. Lord Zouch*, 1 *Plowden* 353. *Co. Lit.* 246, a. *Gray vs. Wender*, 1 *Strange* 556. *Duroure vs. Jones*, 4 *D. and E.* 300. *Frances vs. Jesson*, 6 *East* 80. *Vaughan vs. Grey*, *Mosely* 245. *Hickman vs. Walker*, *Willes* 27.)

The English judges consider their statute of limitations a uniform homogenous system of laws intended to prevent litigation and to quiet persons in their possessions, and they have therefore adopted the same construction with regard to all of them. I have already remarked in the case of *Gibson and Taylor*, that the constitutional court had in the case of *Rose and Daniel*, (2 *Const. R.* 549. *Tread. Ed.*) given a different construction to our act, in actions involving titles to land. The principle of that decision has since passed into a law by an act of the legislature at its last session.

In all cases not affecting the possession of lands our courts have generally, if not uniformly, been governed by the rule of construction adopted by the English courts. (*Adamson vs. Smith*, 2 *Constitutional Reports* 269. *Nicks and Martindale*, *supra*.) Why the legislature thought it proper to make such a distinction, I do not know; but as the last act refers exclusively to actions relating to the possession of lands, (2,) it is to be presumed that they were satisfied with the

(2) The act of 1824, does not, in words, speak of any particular kind of action, but by necessary construction, it must be confined to actions for lands, as it speaks of the *rights of minors* accruing upon the death of the ancestor; which would not be the case if it were a personal action, as it would accrue to the executor or administrator, and not to the minor or heir. R.

construction given to the former act in other respects. Perhaps the circumstance, that the judges had been unanimous in their opinions in one case and had been divided in opinion in the other might have had its influence.

For it will be observed that the judges who constituted the majority in the case of *Rose & Daniel*, concurred with the other judges in the case of *Adamson & Smith*, (2 Cons. Rep. 269,) and *Nicks & Martindale*. The act itself contains certain exceptions, and according to the stale maxim, that *expressio unius est exclusio alterius*, we are not to suppose that the legislature intended that any other should be made. The duty of courts is confined to the exposition of the law, and ought not to be extended to supplying supposed omissions of the legislature. We are not therefore authorized to add exceptions to those made by the act. The statute of limitations goes upon the principle that the defendant has a good title, or has paid the debt, as the case may be, the evidences of which have been lost by time or accident. That presumption is rebutted by the commencement of an action. The remedy therefore shall not be lost by the death of the party. The act of 1789 exempts all executors and administrators from suits for nine months after the death of their testators or intestates, *Moses vs. Richards and others*, 2 Nott & M'Cord, 259. That act has been considered as having extended the statute of limitations during that period. But that is a construction which necessarily results from the provisions of the two acts when taken together. In the case of *Kenedy & Edwards*, the statute had not commenced in the life time of the intestate. It would not therefore run against the administrator, until administration was granted; for until then there was no person against whom it could run. The case of *Robinson & Wall*, 2 Nott & M'Cord 598, appears to me to be the most difficult to get over. In that case the court held that was suspended the statute of limitations in favour of an alien enemy. That I think was carrying the doctrine to the utmost extent of liberality. But that, it is said "is adopting a part of the law of nations." Then it is the law and not the court which makes the exception. It does not appear therefore that this court has ever allowed any exceptions not made by the act, nor that there has been any such conflict of opinions on the subject as the circuit judge seemed to imagine. The only conflicting decisions which have taken place, are those of *Rose & Daniel*, and *Fayson & vs. Prather*, both of which related to the possession of land. I do not concur in the opinion that to take advantage of the statute of limitations is an unjust defence. An unprincipled man may to be sure, sometimes use it as an instrument of fraud against an indulgent creditor. But then it is the fault of the plaintiff, who has disarmed himself and

put a weapon into the hands of his antagonist. It may however be a shield to the honest and unprotected, and who may have no other means of defence.

Evans & Coggeshall, for the motion.

Levy & Wilkins, contra.

LEWIS MEADOWS, Sen. vs. WILLIAM MEADOWS, jr.

Upon a sale of lands at auction, the clerk of the auctioneer, is not such an agent of the parties whose entry will take the case out of the statute of frauds.

An entry, to be a compliance with the statute, must contain a memorandum of the contract, and must state distinctly, the article sold, the price and the purchasers' name.

An entry in these words: "The tract of land to Wm. Meadows at \$5,48," is insufficient.

It seems, an auctioneer is a sufficient agent of both parties, on a sale of lands, whose entry of the memorandum of sales will comply with the statute.

This was an action of assumpsit, for the purchase money of a tract of land bid off by the defendant, at an auction had by the plaintiff of his property.

The questions made were, whether the clerk of the auctioneer was a sufficient agent of the parties, to bind the defendant, by an entry of the sale in a book, had for that purpose; and 2nd, whether the entry made was a sufficient memorandum of the sale. The entry was in these words: "The tract of land to Wm. Meadows, jr. at \$5,48."

COLCOCK, J.—Upon reading the statute of North Carolina, it is found to be in the very words of the statute of frauds, with the addition of the words, *slave or slaves*; and consequently subject to the same construction which that statute has received.

It was soon discovered that the provisions of the statute of frauds greatly impeded the business of sales at auction and the first effort was to declare that they were not embraced within its provisions. But the generality of its terms was too extensive to be thus restricted, and it was then deci-

ded in the case of *Simon vs. Motivos* (3 Burrows 1921,) that the auctioneer was the agent of both parties, and that his putting down the *name of the purchaser*, the *article sold* and *price and terms* should be considered as a sufficient compliance with the requisites of the statute.—The articles sold were goods. For sometime it was held that this doctrine was not applicable to the sale of lands or any interest in them, and several decisions to that effect were made. The first was, that of *Stansfield vs. Johnson*, (1 Esp. Rep. 101.) That was a sale of copy-hold lands, and the chief justice held the defence of the statute of frauds good, saying that the case of *Simon vs. Motivos*, applied only to goods. This was followed by the case of *Walker vs. Constable* (1 Bos. & Pul. 101,) in which the same opinion was expressed; and the case of *Buchmaster vs. Harrop* (7 Ves. 341,) was decided by Sir William Grant, on the authority of these two cases. But Lord Erskine and Lord Eldon, afterwards, both gave contrary opinions. They ask why the difference? Although the form of the two clauses differ not as to that part of them which requires the memorandum in writing, they are the same. (13 Vesey, 456, 9 Vesey 249.) And these decisions have been followed by several others which may be considered as putting the question at rest. (*Emmerson vs. Heelis*. 2 Taunton, 38. and *White & Proctor*, 4 Taunt. 209; and *M'Comb vs. Wright*, 4 Johnson's Chancery Rep. 665. But although I am compelled to yield to this weight of authority, I cannot forbear to express an opinion that it would have been better to have adhered to the provisions of the statute. For although from the concourse of persons who usually attend these public sales, it may not be easy to practice fraud, yet there is no doubt but it is sometimes done; at all events much litigation would have been prevented.

In the case before us, however, the plaintiff cannot succeed; for the entry was not made by the auctioneer; and we must be careful not to extend the doctrine so far as entirely to destroy the salutary provisions of the statute. The entry

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 694
 en made by the clerk; and in the first case, to, *Coles vs. Trecothick*, (9 *Vesey* 251) it is an auctioneer's clerk, notwithstanding any signature to the contrary, is not an agent within the statute. His signature will give validity to a contract of sale by auction, unless the authority of the party has been specially obtained for that purpose, or he has assented to it.

Again, in all the cases, and in the leading case in particular, it will be found that it is required that the entry, to be a compliance with the provisions of the statute, must be a memorandum of the contract; that it must state distinctly the article sold, the price and the purchaser's name. (*Hodgkins vs. Bond, Adams*, 284. *Parkhurst vs. Van Cortlandt*, 1 *John. C. R.* 273.) Now the entry produced is in these words: "The tract of land to Wm. Meadows, jr. at \$5 48." What evidence does this afford of the contract? What tract of land. How many acres? Would such a description convey any title to the purchaser? Would it enable him to compel a performance of the contract by the vendor, should he refuse? It certainly could not. Therefore it cannot operate against the defendant. On these two grounds the determination of the court rests. But if it had been necessary to investigate the other grounds there is no doubt that more than one of them would have been sustained.

The motion is granted, (a)

May, for the motion.

Levy and M^r Willie contra.

(a.) That the auctioneer is not the agent of vendor and vendee, both, upon a sale of lands, see, besides the cases mentioned in the text, *Higginson vs. Clowes*, 15 *Ves.* 516.

That the auctioneer is the agent of both parties, see *White vs. Proctor*, 4 *Taunt.* 209. *Davis vs. Robertson*, 1 *Const. Rep. Tread.* Ed. 71. *Jenkins vs. Hogg*, 2 *Const. Rep.* 821. *Merritt vs. Clayson*, 14 *Johns. Rep.* 484.

Where the agent of the vendor wrote the note in the vendor's order-book, in the presence of the vendee, although he afterwards, at the desire of the vendee (the defendant,) read it over to him, it was held

that the signature was not sufficient. (*Cooper vs. Smith*, 15 East. 103.) And it has been held, that one of the contracting parties could not be considered as the agent of the other, although the other overlooked him, and gave him directions as to the terms. *Wright vs. Deanah*, 2 Camp. 303. The agent must be a third person. Therefore, where an auctioneer wrote down the defendants name by his authority opposite to the lot purchased: Held, that in an action brought in the name of the auctioneer, the entry in such book was not sufficient to take the case out of the statute. (*Farebrother vs. Simmons*, 5 Barn. and Ald. 333.) R.

JOSHUA TEAGUE vs. THOMAS S. WILKS.

In an action for malicious prosecution, it is necessary to set forth, in the declaration, that the prosecution is at an end; and to show in what manner it was terminated.

That the defendant was acquitted by the grand jury, or by a *noli prosequi* or by arrest of judgment, does not necessarily show that the prosecution has been put an end to, and in such cases, it is, therefore, necessary to state that he was finally discharged, by order of the court.

Where the declaration stated "that the plaintiff had been acquitted by the grand jury's finding "no bill," and that the said prosecution is wholly ended and determined, and he the said plaintiff wholly discharged therefrom, as by the records and proceedings thereof remaining in the said court appears," the court held it was a sufficient statement of the discharge of the plaintiff from the prosecution.

But that if it were not sufficient, it could only have been taken advantage of on demurrer, and was cured by pleading to the merits.

In a statement, that the plaintiff was *acquitted*, without specifying in what manner, the word "*acquitted*" is to be construed a technical word, which means, acquitted on trial by a petit jury;

But where the manner of *acquittal*, is set out in such a way as to show that the word "*acquitted*" was not intended to be used in its technical sense, it will be taken with such qualifications.

Where a technical word is used without any qualifications the court will give it its technical meaning, yet when it is accompanied with such qualifications as show that it was intended to be understood in a different sense, it will be taken with such qualifications.

Tried before judge Richardson, Laurens, fall term, 1826.

This action was brought against the defendant for maliciously and without reasonable or probable cause insti.

tuting and prosecuting an indictment against the plaintiff for hog stealing. The plaintiff proved that the defendant applied for, and procured a warrant to be issued against the plaintiff on which he was arrested, and that he went before the grand jury as prosecutor. The bill of indictment was produced, with his name on the back, and the finding of "*No Bill*," by the grand jury; and an order of the court from the minutes was then also produced, for the discharge of the plaintiff from his recognizance in that case in the following words, viz: "*State vs. Joshua Teague. Hog stealing. The State vs. Joshua Teague, trading with a negro. Three indictments.*"

The grand jury having returned into court and found no bill in the above cases, on motion, *ordered*, that the defendant be discharged from his recognizances."

The plaintiff then proceeded to show by the testimony of many witnesses the want of probable cause, and express malice, and closed his case.

The defendants counsel then moved the court for a nonsuit.

1. Because the plaintiff had not shown how the prosecution was ended. That the finding of "*No Bill*" by the grand jury, and the order of the court for the discharge of the defendant were not sufficient to support the declaration.

Several other grounds were taken, which however were disregarded by the court. In support of the first ground the declaration was referred to, which after setting out the preliminary proceedings, proceed as follows: "which said indictment for certain reasons was given to the grand jury of the district aforesaid, and he the said Joshua Teague was in due manner and by due course of law acquitted of the said premises in the said indictment charged upon him, by the grand jury aforesaid, by their finding "*No Bill*;" and the said Joshua Teague further saith that the said prosecution so as aforesaid set on foot by the said Thomas S. Wilkes, is wholly ended and determined, and he the said Joshua Teague wholly

discharged therefrom, as by the records, and proceeding thereof remaining in the court, appears."

His honour sustained the motion and granted the nonsuit, on the ground that the declaration did not set forth how the prosecution was ended; and that it did not show that the prosecution was ended at all.

The plaintiffs counsel moved the court of appeals to set aside the nonsuit and to reinstate the case on the docket.

1. Because the declaration abundantly sets out the determination of the prosecution and the discharge of the defendant, as well as the manner of it.

2. Because the exception to the declaration could not be taken by demurrer, and cannot avail the defendant on motion for a nonsuit, at the trial after the general issue pleaded.

NOTT, J.—From the course of argument which has been pursued in this case, there are two questions for the consideration of the court:

1st. Whether the declaration upon its face shews sufficient cause of action to entitle the plaintiff to recover?

2nd. Whether the testimony adduced supported the allegations contained in the declaration?

In an action for a malicious prosecution it is necessary to set forth in the declaration that the prosecution was at an end. (*Smith vs. Shackleford*, 1 Nott & Mc Cord 36.) It is also to shew in what manner it was terminated. That is to say, whether by an acquittal of the plaintiff on trial by the rejection of the bill by the grand jury or by a *noli prosequi* or arrest of judgment? The three last methods do not necessarily put an end to the prosecution; because the defendant may still be proceeded against. It is necessary therefore to state that he was finally discharged. All these requisites are to me sufficiently apparent on the face of this declaration. It is contended that it is not sufficient to state that he was discharged, but that it should have been stated expressly that he was discharged by the order or judgment of the court; and I believe the precedents are usually in that form. But it appears to be implied in the allegation, that he was, "whol-

discharged therefrom, as by the records and proceedings thereof remaining in the said court appears." There is no other way that he could be discharged, but by the order of court; and without it his discharge could not appear of record. But at most it was but an error in form and ought to have been taken advantage of by demurrer, and was cured by pleading to the merits. It was no ground for a nonsuit; for the facts being explicitly stated and issue taken upon them the plaintiff was entitled to a verdict if they were true. (1 *Saunders* 223, n. (1) 1 *Chitty's Pleading* 401-2. 3 *Com. Dig.* 376, *Tit. Pleader C.* 85. *Avery vs. Hoole*, *Cowp.* 825. *Rushtord vs. Aspinall*, *Doug.* 679.) Judge *Buller* says, in the case of *Morgan and Hughes*, (3 *D. & E.* 225,) that "alleging that he was discharged by the grand jury's not finding a bill would shew a legal end to the prosecution." (See *State vs. Smith*, 1 *Nott & McCord* 13.)

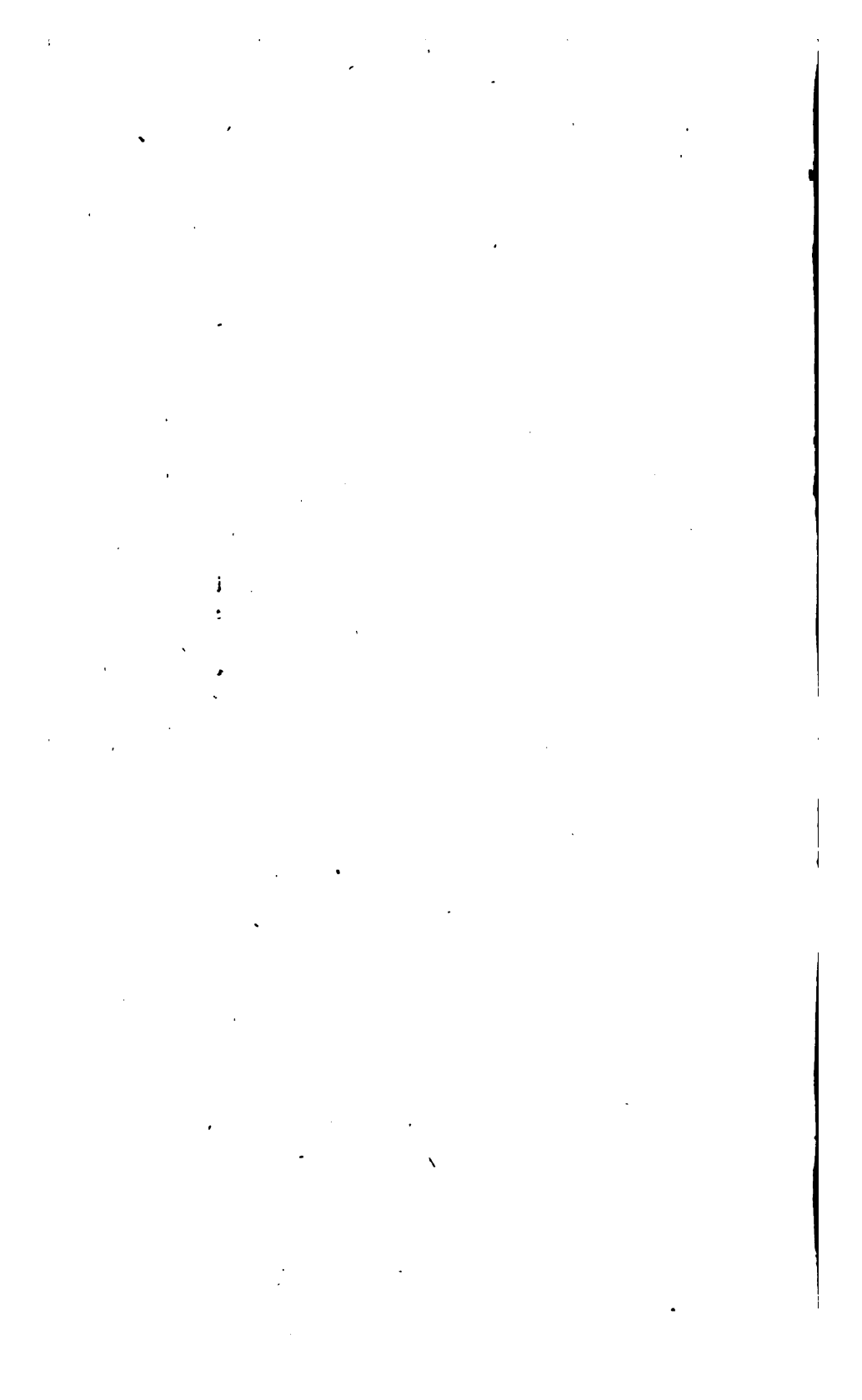
But, secondly, it is contended that the proof did not support the allegation in the declaration. That the declaration alleges that he was *acquitted*, whereas the proof was that the grand jury found no bill against him, which was not, in contemplation of law, an *acquittal*. And in support of that ground, the case of *Thomas vs. De Graffenreid* (2 *Nott & McCord*, 143,) is relied on. But that case is very distinguishable from this. In that case it was set forth in the declaration that the plaintiff had been *acquitted* without specifying in what manner. The court held that "*acquittal*" was a technical word which meant acquitted on trial by a petit jury, and being used without any qualification must be understood in its technical sense; And therefore shewing that the grand jury had rejected the bill did not support the declaration. But in the case now under consideration it is stated, that he was "acquitted by the grand jury's finding no bill." The manner of acquittal is set out in such a way as to shew that it was not intended to be used in its technical sense. And, although, when a technical word is used without any qualification the court will give it its technical meaning, yet when

it is accompanied with such qualifications as shew that it was intended to be understood in a different sense, it will be taken with such qualifications. And although the declaration may not be drawn in the most technical form, I do not know that the facts could have been set out with more precision. If it had been "*discharged*" instead of "*acquitted*" it is admitted that it would have been sufficient. And in common parlance I think "*acquitted*" is as clearly expressive of the idea intended to be conveyed, as *discharged*. It is frequently used in that sense by the best pleaders, as will be seen by reference to the precedents. *Chitty*, giving the form of a declaration for maliciously charging the plaintiff of felony before a justice of the peace and causing him to be imprisoned on a warrant, until he was discharged by the justice, concludes with saying, "the said justice adjudged and determined that the said A. B. (the prisoner) was not guilty of the said supposed offence, and then and there caused the said A. B. to be discharged out of custody fully *acquitted* and discharged." (2 *Chitty's Plead.* 250-1.) It is not unusual to find it in all legal proceedings used in its vulgar sense, and it is only when it is used in reference to proceedings which seem to require that it should receive a technical application, and then without any qualification, that the court will be bound to understand it in that sense. I think, therefore, that the allegations are literally supported by the testimony, and that the cause ought to have been sent to the jury.

The nonsuit is, therefore, set aside and a new trial granted.

O'Neal & Earle for the motion.

P. Farrow contra.



COURT OF APPEALS,
OF THE
STATE OF SOUTH CAROLINA,

May Term, 1826—Columbia.

JUDGES PRESENT,
Nott, Colcock, Johnson.

MEMORANDUM.

[The Reporter regrets that he has not received the manuscripts of the intervening Term of Charleston, in time to print it in this, its proper place. Rather than stop the press, he has inserted here the succeeding Columbia Term.]

Adm'rs. of **JOSEPH HOWARD vs. ALEX. AIKEN.**

Where justice has been done by the verdict of the jury, the court will not grant a new trial

A trustee cannot acquire a title by the statute of limitations against his cestuique trust.

Tried before Judge Richardson, at Union Spring Term, 1826.

It appeared in evidence, that William Porter in his life time made a deed for a few acres of land to plaintiffs' intestate, as trustee for a certain Baptist congregation in Union district. He afterwards executed a bond to the same person,

with a condition to make titles to him in his own right to the whole tract of land, embracing the part which had been previously conveyed in trust. The titles were never made; but the plaintiffs' testator continued in possession until he acquired a possessory title. He then sold the land to the defendant who was ignorant of the trust deed. This was an action for the purchase money. The defendant contended that the plaintiffs' intestate had no title to the land conveyed to him in trust for the Baptist Congregation, and therefore he was entitled to a deduction for the value of that land. And that was the only question submitted to the court.

The jury found a verdict for the defendant, and this was a motion for a new trial, on the ground, that the verdict was contrary to law and evidence.

NOTT, J.—That such a congregation actually exists, as is described in the deed, that it has occupied the land so conveyed from the time of the conveyance, and is still in the enjoyment of it, is admitted. But it is contended, that it has not been incorporated and therefore has no legal existence.

Whether it is incorporated or not we do not know, as there does not appear to have been any evidence on that point. The plaintiffs' intestate however accepted the deed in character of trustee. He therefore admitted the fact, and thereby dispensed with the necessity of further proof on the part of the defendant. He could not acquire a title by possession to land which he held as trustee. And having no title himself, he could convey none to the defendant.

It is however further contended, that, as trustee, the legal title was in him; and that the defendant is not entitled to relief in a court of law. Without going into the enquiry how far a court of law will take notice of a trust in such a case, it is sufficient that we can see that a court of equity would give relief. The jury therefore have decided according to the justice of the case. And this court do not feel bound to aid the plaintiffs, in the sacrilegious act which they are attempting to commit. We will not grant a new trial,

for the purpose of driving the parties into another court, when we see that justice has been done.

Herndon, for the motion.

Thomson, contra.

JOHN BLAKELY *Ad'mr. ads.* NOAH HAMPTON.

Parol proof is admissible to shew that a note had been given in substitution for two other notes, which were taken up, in order to admit the two notes in evidence, and to shew by the calculations made in figures on them, that the substituted note, by *mistake*, had been given for a wrong sum.

Between the original parties, evidence may always be given of the true consideration of a note: So it may be proved that it was given for the balance due on a settlement of accounts, and that a mistake was made in the amount.

The rules of evidence are the same in law, as in equity, except in some particular cases where parol evidence is let in, merely with a view of affording the court of equity the means of exercising its peculiar jurisdiction.

Where parol proof cannot be admitted in equity, *a fortiori*, it ought not to be admitted at law.

The doctrine of parol evidence generally discussed.

Tried before judge Huger at Laurens, Spring term, 1826.

This was an action of assumpsit on a note. Plea, general issue. The note was admitted. The defendant offered evidence to shew, that the note in question had been given for the balance due on a settlement of sundry accounts.

Judge *Huger* thought the evidence inadmissible. A verdict was found for the plaintiff.

The defendant appealed on the ground: That he should have been allowed to shew that the note in question was by mistake given for more than was really due.

NORT, J.—There is no principle of law more familiar to the profession, than that parol proof cannot be admitted to add to, alter, or contradict a written agreement. But it has been so much broken in upon by various decisions, both in law and equity, that the rule itself appears almost to be lost

in the various qualifications and exceptions which have been made to it.

Phillips has collected a great variety of cases on the subject. But it does not appear to me that he has advanced far towards removing the difficulty. He has however rendered one important service to the profession, in bringing the cases together by which those who are disposed to investigate the subject, are directed where to go for information. He says (*p.* 353-4,) it does not appear from any reported case, that the plaintiff has been allowed to give parol evidence varying a written agreement, on the ground of *mistake or surprise*. Yet he says, (*in p.* 458-9,) mistakes, and misapprehensions in the drawers of deeds or written agreements, are a subject of relief in courts of equity, and may be rectified according to the true intention of the parties. The leading cases referred to, are *Joynes vs. Statham*, 3 *Atkins*, 388. *Clinan vs. Cooke*, 1 *Schoales & Lefroy*, 22. *The Marquis of Townsend vs. Stangroom*, 6 *Ves.* 328; and *Woollam vs. Hearn* 7 *Ves.* 28. *Baker vs. Payne*, 1 *Ves.* 456; and 6. *Ves. jr.* 336, *in note*. In the first case, *Joynes vs. Statham*, lord *Hardwicke* received parol evidence to correct an omission in a lease, and he then said it was immaterial whether it was insisted on as a *mistake or fraud*.

Lord *Redesdale*, however, in the case of *Clinan vs. Cooke*, (1 *Schoales & Lefroy* 22.) notices this case, and adds: "there is a prior case, *Walker vs. Walker*, 2, *Atkins* 98, where lord *Hardwicke*, is made to say something similar; and there seems to be somewhat of a floating idea in the mind of his lordship, that, by possibility, a case might be made, in which even a plaintiff might be permitted to shew an omission in a written agreement, either by mistake or fraud." "However, (says his lordship) "I can find no decision except the contrary way." In the case of the *Marquis of Townsend vs. Stangroom*, lord *Eldon* again reviews all those cases, and concludes with saying, "I agree, that those producing evidence of mistake or surprise, either to rectify an agreement,

or calling upon the court to refuse a specific performance, undertake a great difficulty; but it does not follow, that it is therefore incompetent to prove the actual existence of it by evidence."

In the case of *Woollam vs. Hearn*, 7 Vesey, jr. 218, the Master of the Rolls, Sir W. Grant, referring to all the foregoing authorities, says: "by the rule of law, independent of the statute, parol evidence cannot be admitted to contradict a written agreement. To admit it for the purpose of proving that the written agreement does not contain the real agreement would be the same as admitting it for every purpose. It was for the purpose of shutting out that inquiry, that the rule of law was adopted. Though the written instrument does not contain the terms, it must, in contemplation of law, be taken to contain the agreement, as furnishing better evidence than any parol can supply. There, says this learned lawyer, stands the rule of law." He then proceeds to consider the subject as applicable to the courts of equity, and lays down the rule, that parol proof is never to be admitted to correct a mistake in favour of the plaintiff seeking the specific performance of an agreement. He admits however, that such evidence ought to be admitted to prevent the specific execution of a contract. Judge Kent, in the case of *Kiesselbrack vs. Livingston*, (4 Johnson's Chancery, 146,) says he is not sufficiently instructed to admit the soundness of that distinction, and seems to think that there is no distinction in that respect between plaintiff and defendant. He lays it down in the same case, as understood and settled, that the court has jurisdiction to correct such mistake; and in various other cases speaks of it as a settled rule, that the correcting of a mistake is as well a ground for letting in parol proof as that of fraud. (*Stevens vs. Cooper*, 1 Johnsons C. 429. *Botsford vs. Burr*, 2 Do. 415.) All these cases are to be sure from the court of equity. But it seems to be very well settled that the rules of evidence are the same in law as in equity, except in some particular cases where parol evidence is let in merely with a view of affording the

court of equity the means to exercise its peculiar jurisdiction. But if such proof cannot be admitted in equity *a fortiori* it ought not to be admitted at law.

But Judge *Swift*, in his *Treatise on Evidence*, I think, has taken the best view of the subject. After laying down the general rule on the subject, he undertakes to reduce the exceptions to something like principle. One of his rules is that, "where there has been a mistake in fact, parol evidence may be admitted to rectify it." As where a testator by mistake inserts the name of A, instead of B, in a legacy or devise. (6 *Term Rep.* 671. 2 *P. Williams* 141.) Where a bill of exchange was drawn on *Josiah* Raymond, when *Joshua* Raymond was intended, parol evidence was admitted to shew the mistake. (1 *Day* 11.) So to shew that a receipt purporting to be in discharge of a note, dated 3rd of May, was intended for a note dated the fifth of May. And in the case of *Nevison vs. Whitley*, (*Cro. Car.* 501,) it was permitted to be shewn by parol evidence that a bond for one hundred pounds, with a condition to pay fifty eight pounds at the end of six months, was intended to be made payable at the end of the year, and that six months was inserted by mistake of the scrivener. (*Swifts Ev.* 39.) From these cases it will appear that the rule applies as well to cases of mistake as fraud, and that it is the same both in law and equity. In the case of *M'Creary and Jaggars*, decided in this court at the last Spring term, it was held that parol evidence might be admitted to shew that a note which had been given in pursuance of an award had been given for too much, in consequence of a mistake in the arbitrators which they themselves had afterwards discovered.

Now what are the facts in the case before us. The presiding judge reports that the defendant offered evidence to shew that the note in question had been given for the balance due on a settlement of sundry accounts. The object of offering the evidence does not appear. It was nothing more than evidence of the consideration, which we have always ad-

mitted. Indeed we have admitted evidence to show that a note purporting to be for value received was given without any consideration, (*Bremar & Singleton, State Reports, 201.7 Johns. 26. Do. 224.*) It is stated by the counsel, that the object of the parol proof was to shew that the note in question was given as a substitute for two other notes which were then given up, and that by the production of those notes and the calculations appearing in figures, it would shew that a mistake had been made in the amount. If that is a true statement of the facts, then the parol evidence was not for the purpose of contradicting the written agreement, but merely to shew the consideration, to let in written evidence or memoranda by which the mistake might be rectified. I think therefore that upon either ground the testimony ought to have been admitted. Whether it would have been sufficient to establish the fact against the written contract is a distinct question. I think the motion ought to be granted.

P. Farrow for the motion, (a.)

Irby contra.

(a.) SAMUEL M'CREARY vs. ELISHA JAGGERS.

"In this case it was stated by Mr. Eves attorney for the defendant, that he would go into evidence by which it would clearly appear, that the note had been given in consequence of an imperfect settlement between the plaintiff and the defendant, by persons to whom the same had been referred. That it was understood and had been expressly agreed, at the time the defendant signed the note, that if, on a future investigation, it should be found, that the amount expressed in the note, exceeded the actual amount due from the defendant, in such event the plaintiff would make the allowance, and correct the mistake. That the arbitrators had taken upon themselves the burthen of a further and more minute examination of the matters referred to them, and had thereby ascertained that the amount called for by the note was considerably beyond what the defendant justly owed. That the plaintiff had been frequently called upon to correct the mistake pursuant to his agreement, and had refused to do so.

The presiding judge overruled the admissibility of the evidence offered, as not allowable under the plea of the general issue, and that

parol testimony could not be received to contradict the internal and higher evidence, which the note itself furnished. That if the defence insisted on could avail the party, it could only be by pleading the subsequent award, which was to operate by way of defeazance, and of which the plaintiff should have been duly notified; that the introduction of the evidence relied on by the defendant, would take the plaintiff by surprise, &c.

COLCOCK, J.—From the view which is presented to us of this case, by the report of the presiding judge, two questions arise: First, whether parol evidence was admissible in the case? and secondly, if so, whether it could be admitted under the plea of the general issue? It is only necessary to take such a view of the case, as will determine the legal character of the defence, and we shall then, at once, perceive that the testimony was improperly rejected. Now what is it that the defendant alleges? That by the mistake of the accountant, who were called on to settle their accounts and ascertain the balance due, he was induced to give his note for a greater sum than was actually due. He therefore pleads a want of consideration in the note. In an action of assumpsit, such defence may always be made under the general issue. And this has been the long established doctrine, notwithstanding it is subject to the objection of the presiding judge. *Chitty* does say, considering the language of this plea, it might perhaps seem at first view, that the defendant by it only denies the fact of his having made the promise; as, however the definition of a contract not under seal, is "an agreement founded on a *sufficient* and legal consideration to do some legal act, or to omit the doing an act, the performance of which the law does not enjoin," the above plea by denying the contract, in effect, puts in issue every part of the above definition, viz: the agreement, whenever it is obvious that the *sufficiency* and legality of the consideration and of the act to be done, is omitted, are fairly put in issue by this plea. (1 *Chitty* 469—70.)

Now, it is the insufficiency of the consideration which the defendant complains of.

In this particular case there was less ground for the objection of surprise than in ordinary cases, for the arbitrators had reviewed their calculations and declared their mistake, so that the great probability, almost amounting to certainty, is that the defendant was well apprized of the defence. The motion is granted.

JANE ROBARDS vs. NIM HUTSON & BENJAMIN PRICE.

Where husband and wife have separated, and the wife has acquired some personal property, in a suit for a trespass to such property, it is error to join the wife with the husband.

The plaintiff brought this action to recover damages for a trespass committed on her personal property, the husband being joined for the sake of conformity.

The counsel for the plaintiff stated, that, she and her husband had separated, and that she supported herself by her daily labour; that she did not trade, but had, by her manual labour, accumulated the property upon which the trespass had been committed. The court being of opinion that she could not be regarded as a sole trader, ordered a nonsuit: from which order, she appealed on the grounds:

1st Because the action was properly brought.

2nd. Because coverture should have been pleaded in abatement.

NOTT, J.—The court concur in opinion with the presiding judge in this case, and the motion is therefore refused.

J. W. Farrow, for the motion.

J. T. Earle, contra.

WM. WALLIS and wife vs. MARY GILL adm'rx.

The court of law will not hear appeals from the ordinary on matters involving the settlement of accounts.

The object of appeals to that court is to require the aid of the court in those cases, where according to the common law mode of administering justice, the parties could have the benefit of that jurisdiction.

Where an appeal from the ordinary is of such a nature that it can be entertained by the court of law, new evidence may be offered.

Tried before his honor judge Richardson, at York,
Spring Term 1826.

The question as to the value of certain advances made by the testator in his life time was before the ordinary, and from his decision of the value of the property, Mary Gill appealed to the court of common pleas, and offered to prove by attending witnesses that the advancements were worth nearly four hundred dollars more than that fixed by the ordinary.

His honour rejected the testimony on the ground that no evidence, not offered before the ordinary, could be received there, but that the case must be tried upon the report of the ordinary. The jury found a verdict, conforming to the decree of the ordinary.

The appellant now moved for a new trial on the ground.

That his honour erred, in refusing to allow her to examine witnesses in open court, on the value of said advancements.

NORR, J.—I think the error of the judge in this case was in hearing the appeal at all. I am disposed however to think that where an appeal is of such a nature that it can be entertained in a court of law, the jury ought to hear the witnesses. But this court has always declined entertaining jurisdiction of cases involving the settlement of accounts of executors, administrators, and guardians, and of all persons acting in a fiduciary character. And although the legislature has given an appeal from the ordinary to the court of common pleas, it could not have been intended to transfer the settlement of accounts from that tribunal to a jury. The object must have been to require the aid of the court in those cases where according to the common law mode of administering justice, the parties could have the benefit of that jurisdiction.

Without such appeal the decree of the ordinary would be final and conclusive, in all matters both of law and fact where relief could not be had in the court of equity, a power which the legislature probably thought too great to trust to that officer without the supervising power of some superior court. But it was not intended to change the jurisdiction, and to draw from the court of equity in this indirect way,

those cases in which the parties had an adequate remedy in that court.

This court is of opinion that the circuit court had no jurisdiction of this case. If the ground of appeal is, that the decree of the ordinary is contrary to the evidence, that question could be tried only on the evidence before him. The motion therefore must be refused.

Williams for the motion.

Mills contra.

WM. HALL vs. JAMES A. MOREMAN.

The court will not readily lend an ear to a charge of incapacity, arising from intemperance, in order to invalidate a solemn act of an individual.

If people will voluntarily incapacitate themselves from doing their ordinary business they must take the consequences of their own imprudence; unless a fraud is committed upon them when in a state of intoxication their acts are binding.

Upon a confession of judgment on an *insimul computasset*, the fact of a bond's forming an item in the account will not vitiate the proceedings.

But if there be an irregularity in the bill of particulars, the defendant may waive it, by a confession of judgment; and the clerk has no right to refuse to record the judgment, on that account.

A question of fraud in obtaining a judgment, or a question as to the regularity of the declaration, in conforming to the bill of particulars, after a confession of judgment, cannot be tried by rule or motion.

Motion to reverse an order made by judge Richardson at Union, and for an order to the clerk to enter up judgment against defendant *nunc pro tunc*.

The defendant being indebted to the plaintiff, and being also indebted to others in a large amount, for which judgments were about to be obtained, consented to confess judgment to the plaintiff for a portion of the debt due him. The agent of the plaintiff not being in possession of the evidences of the debt, stated an account, which was acknowledged by defendant to be correct and just, and a confession taken accordingly. The confession was made at dark on the

It is not pretended that the claim is unfounded, or that the defendant has confessed judgment for more than is actually due. But besides, this is not the way to try the given questions which are now submitted to the court. It does not appear at whose instance the application is made. If at the instance of the creditors, they have also a more ample remedy, if there is any fraud in the transaction.

The order of the court below is therefore reversed, and the clerk of the court is directed to record the judgment as of the date of the confession.

Clendenin and Preston for the motion.

O'Neal contra.

SARAH C. WAKEFIELD *Adm'r.* vs. JOHN BECKLEY *Exor.*
MARY WILSON.

On a bond conditioned to pay several sums by different instalments "*without interest, but with interest if not punctually paid.*" the money not having been punctually paid, it was held, that interest was recoverable from the date of the bond, and not from the time the instalments respectively became due; and the penalty became forfeited by the nonpayment of the first instalment.

Tried before his honor Judge James, at Barnwell, April term, 1826.

This was a rule on the sheriff to shew cause why he had not made the money on a writ of *feri facias* in this case.

The question decided by the court arose on the construction of the condition of the bond upon which the judgment was entered up.

The bond was in the usual form, penalty \$3114 with a condition as follows:

"The condition of the above obligation is such, that the above bound Mary E. Wilson, her heirs, &c. shall pay or cause to be paid unto the above named Martha Cannon, or to

her attorney, &c. the sum of \$519, on or before the first January 1810, and the sum of \$519, on or before the first January, 1811, and lastly the sum of \$519, on or before the first January 1812, *without interest but with interest, if not punctually paid, then* this obligation to be void, &c." Judgment was confessed the 13th February 1824, in the following words.

"I admit that the writing obligatory within mentioned is the deed of Mary E. Wilson, deceased, and confess judgment for ten cents damages.

John Beasley Ex'or. of Mary E. Wilson."

It was admitted that the money had not been punctually paid, no payment having been made before 1816, and a balance being still due on the part of the defendant, who appeared for the sheriff. It was contended that the several installments bore interest only from the time they respectively became due; and on the part of the plaintiff it was argued that the money not being punctually paid, interest was due from the date of the bond.

His honour the circuit judge was of opinion that interest was only to be calculated from the time the installments became due, and discharged the rule.

This was a motion to reverse the order of the circuit court, on the ground that the money not having been punctually paid, according to the condition of the bond, and the intention of the parties, interest ought to be calculated from the date.

NORR, J.—The principle involved in this case was settled in the case of the *Exors. of Satterwhite vs. McKie*, (*Harper's Rep.* 397.) in this court. That was an action on a note of hand in which the defendant agreed, that if he failed to pay the note at the time it fell due, he would pay interest from the date. The court held that he was liable to pay the interest according to his contract.

This is a stronger case; for the penalty became forfeited by the nonpayment of the first installment. And he could be

exonerated only by paying up the principle and interest.

The decision must therefore be reversed and the sheriff must proceed to collect the balance due on the execution.

Patterson for the motion.

Wardlaw contra.

ISAAC DAVEGA vs. JAMES MOORE.

A note payable "to order" only, without mentioning the name of any payee, is considered as a note payable to a fictitious person, and may be sued upon by any *bona fide* bearer. (a)

Tried before judge Huger, at Abbeville, March term, 1826.

This was an action of assumpsit, founded on the following instrument "Charleston, May 30, 1821, \$300. On the first day of January 1822, I promise to pay to order the sum of three hundred dollars for value received in house rent, James Moore." The declaration contained a single count, describing this as promissory note delivered to the plaintiff, who was now the holder of it. The signature of the defendant to the writing was admitted. No other proof was offered. The counsel for defendant moved the court for a nonsuit, on the ground that this was not a note within the statute of Ann or the custom of merchants.

The presiding judge sustained the motion.

The counsel for the plaintiff moved the court of appeals to reverse this decision; because the writing declared upon was a good note, within the statute of Ann and the custom of merchants. *Chappell* for the motion cited *Chitty on Bills* 78. (Ed. 1817,) and cases there referred to.

(a) General letters of credit, not directed to any one, it seems, were not uncommon in the Levant, as early as the year 1200. (*Macpherson's An. of Com.* 367. & *Hallam's Mid. Ages. Phil. Ed.* 355, *in note.*)

NOTT, J.—If this were now a new question perhaps the court might have felt some difficulty in coming to a decision upon it. But after the cases of *Tatlock vs. Harris*, 3 Term. Rep. 174. *Vere vs. Lewis Do.* 182; and *Minet vs. Gibson, Do.* 481, (b) I think there can be no question about it. In those cases it was held that a note payable to a fictitious person might be considered as payable to bearer, and therefore any person might sue upon it into whose hands it might come in the ordinary course of business. The last case went up to the house of Lords where it underwent a very full discussion, on which the decision of the King's bench was supported. A very full report of the case with the opinions of the judges may be found in 1 *H. Black. Reports* 565. I cannot distinguish this case from a note payable to a fictitious person. For a note payable to a fictitious person is payable to no one in particular; it may therefore be considered as payable to bearer and recoverable by any person who may become the honest holder of it. From the case of *Bennet vs. Farnel*, 1 *Campbell*, 130, it might be inferred that Lord *Ellenborough* entertained a different opinion. But that opinion is explained in the *Addenda* (*Do.* 180,) wherein his lordship admits that the holder may recover, as bearer, if it can be shewn that the acceptor knew that the payee was a fictitious person. And with that qualification the holder in this case is entitled to maintain his action; because the maker of a promissory note stands in the double relation of drawer and acceptor, and therefore must know to whom it is payable. I can see no objection to my giving it such a construction. Perhaps the first inventor of such a bill might have done it with a fraudulent intention as the judges of England appear to have thought

(b) Where bills are made payable to a fictitious payee, a *bona fide* holder for a valuable consideration may prove them under a commission of bankruptcy against the indorser, *Ex-Parte Clarke*, 3 Bro. 238. *Ex-Parte Allen, Co. Bt. Laws*, 172. *Collis vs. Emet*, 1 *H. Black.* 313. *Gibson vs. Minet, Ibid.* 569. *Gibson vs. Hunter*, 2 *H. Black.* 288.

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in the case of *Minet & Gibson*. But it would seem to me to carry with it rather the appearance of honesty, unless accompanied with some circumstances which authorized a different conclusion. The drawee sends his note into the world like a bank-bill, declaring that he will pay it into whose hands soever it may happen to come.

I am of opinion therefore that the motion to set aside the nonsuit ought to prevail.

Chappell, for the motion.

Lomax, contra.

JOHN BAILEY vs. SAML. WRIGHT.

The acceptance of an obligation of an inferior, or even of an equal, degree does not extinguish a prior obligation.

So, the taking of a new bond, it seems, is no extinguishment of a prior bond, and the obligee may proceed on either.

The giving of a bond or note for rent is no satisfaction, because the party has a higher security by distress.

The landlord cannot distrain until the rent is due by the terms of the agreement.

Tried before judge Richardson, at York, Spring term, 1826.

This was an action of replevin. The defendant avowed the taking for rent in arrears, and produced in evidence a single bill by which the plaintiff promised to pay the defendant two hundred dollars, expressed to be for the rent of defendant's house for the year eighteen hundred and twenty two. The court charged the jury that the defendant by receiving the note had waived his right of proceeding by distress; and the jury by their verdict excluded the amount of the note.

The defendant now moved for a new trial.

Because the court misdirected the jury in charging them that the defendant by taking a note for the payment of the rent, for 1822, had barred his right to distrain therefor.

Clendenin for the motion,—Contended that the note

given for rent and not paid did not preclude a distress for the rent. The acceptance of an inferior security will not deprive the party of a security of a higher nature. (1 *Nott and Mc Cord* 187. *Godfrey vs. Newton*, 1 *Esp. N. P.* 72. *Id.* 2 part, 168.)

A. W. Thomson contra.—In *Martin vs. Mitchell*, *Harper's L. R.* 445, the question has been settled, that the party going to trial, accepted the terms imposed on him by the court.

NOTT, J.—The acceptance of an obligation of an inferior or even of an equal degree does not extinguish a prior obligation. The taking of a new bond is no extinguishment of a prior bond and the obligee may proceed upon either. The giving of a bond for rent is no satisfaction, because the party has a higher security by distress. The instrument produced in this case is nothing more than a promise to pay the rent, which he acknowledges to be due, and the law provides the remedy by distress. (2 *Bac.* 290. *Tit. Debt. Rondes vs. Barnes*, 1 *Burr.* 9. *Higgin's case*, 6 *Coke*, 45. 1 *Espinasse* 235. *Buller* 182.) The court are of opinion therefore, that the plaintiff had a right to distrain for the first years rent.

The distress for the second years rent was premature. From the phraseology of the note it will hardly admit of any other construction, but that it was intended as an entire contract for a year, or for such part of the year as he should continue to occupy the premises. And that construction is strengthened by the consideration that three months of the time had elapsed before the contract was entered into. It could not have been understood that payments should have been monthly. I think, therefore, the landlord was not authorized to distrain, until the end of the year or until the tenant had terminated the lease by giving notice that he intended to quit.

A new trial must therefore be granted.

Clendenin and Hill for the motion.

Thomson and Williams contra.

Executor of L. HARRELL vs. GAVIN WITHERSPOON.

Where an administrator contracted to buy a certain quantity of corn, the court held it immaterial whether he bought it for the estate or for his own use, and that he was liable individually upon such a contract, and that it need not be in writing, not being within the statute of frauds.

Tried before judge Gaillard, Darlington March term, 1826.

The case was briefly this. Harrell bought from Thomson one hundred bushels of corn, for which he paid him; but the corn was not delivered before Thomson died. Witherspoon administered on Thomson's estate, and there were one hundred bushels of corn on Thomson's plantation. Witherspoon wanting corn, agreed to take it and pay for it.

Verdict for the plaintiff.

Defendant appealed on the following grounds:

That his honour mistook the law, when he charged the jury that the plaintiff's demand was not within the statute of frauds, 29 Car. 2, c. 3, and, because the verdict was contrary to law.

Ervin for the motion,—Said this was a contract by the executor to pay the debt of the testator, and not being in writing was within the statute of frauds.

Evans, against the motion.—The corn was bought by Witherspoon of Harrell. It was bought for himself. Thomson not complying with his contract, Witherspoon took the contract on himself; his being executor to Thomson, could not change the nature of the contract. An executor has no power to contract a debt for an estate. It may be charged upon an estate, and in equity, the court will set up such debt against the estate; but at law a contract by an executor is always a personal debt. The statute of frauds has nothing to do with this case. See *Fisher vs. Tucker*, at the last equity court. *M'Beth vs. Smith*, *Const. Rep. Tread. Ed.* 476.

Norr, J.—It might perhaps have been made a question whether the plaintiff had acquired such a right to the corn that he could have demanded a specific delivery of it,

or whether it still remained a part of the estate of Thomson, thereby making the plaintiff a creditor for the hundred dollars.

But the defendant has raised no such question and we do not know, therefore, what the evidence on that point would have been. The defendant admitted that the plaintiff was entitled to recover the corn. He agreed to take it from him and to pay him a hundred dollars. It was not an agreement to pay the debt of the intestate out of his own estate but to pay a debt of his own for a valuable consideration moving immediately from the plaintiff to himself. It does not even appear that the corn was received for the benefit of the estate. I should conclude from the terms of the report that it was for his own individual use. It is however not material, the contract was his own and in his own right. It is not a case therefore within the statute of frauds.

The motion is refused.

Ervin, for the motion.

Evans, contra.

ALMOND WOODEN vs. SAMUEL LITTLE.

To an action on an award, the defendant should in his plea either deny the existence of the award, or he should plead performance or something by way of excuse for not performing it.

Under a submission of "all accounts, disputes, controversies and reckonings, of whatsoever nature, now existing between the same parties," it was held that the arbitrators might well embrace in their award, matters of a partnership composed of the parties to the submission and a third person now dead.

Tried before Judge Richardson, Spring Term, 1826.

This was an action brought on an arbitration bond, to which the defendant pleaded performance generally. The plaintiff replied an award, which he set out, and assigned a breach in the nonpayment of the award. The defendant rejoined that the arbitrators took into consideration other

matters than those submitted in the bond, viz: a copartnership transaction between the defendant and his son Robert Little deceased, in order to make Samuel Little the defendant liable for claims the plaintiff had against Robert Little, he alleging that Samuel Little was a copartner of Robert Little and therefore liable for those claims.

To this rejoinder the plaintiff demurred generally, and the defendant joined in demurrer.

On the argument of the case the court overruled the demurrer and gave judgment for the defendant; from which the plaintiff appealed on the following ground:

That by the condition of the bond all matters in controversy were submitted, which embraced the subject matter of the defendants rejoinder.

Wills for the motion,—Cited 1 *Com. Dig.* 681. *Tit. Arb. I.* (4.) 3 *Mod.* 1 *Chitty's Plead.* 618. 2 *Saund.* 83—4 c. n. (1.) 3 *Saund* 188.) Nothing *dehors* the award could be given in evidence to the jury. And a suit at law will not lie to examine the merits of an award. (2 *Wilson* 148. 2 *John. R.* 63. 3 *John.* 369. 10 *John.* 150. 9 *John.* 38. 2 *Bay* 450.) The party had a right to submit the claims as surviving partner, as well as his own. In fact nothing was in dispute but that that of the copartnership claim, and the submission was sufficiently comprehensive for that purpose. (1 *Chitty Plead.* 37. 9 *John. Cases* 405.)

Norr, J.—The pleadings in this case are very irregular. The defendant ought in his plea to have denied that there was any award, or he should have set it out and have pleaded performance or something by way of excuse for not performing it. (1 *Com. Dig.* 555. *Arbitrament I.* 4.)

However without looking into the regularity of the proceedings, the rejoinder has brought before us the point to be decided; to wit, whether on a submission of Samuel Little of all matters and things, &c. was embraced matters of a copartnership concern, or only those in which he was individually interested? The terms of the submission in this case

are very broad; the words are, "all accounts, disputes, controversies and reckonings of whatsoever nature now existing between the same parties. Robert Little, the other partner, was then dead. Little, the surviving partner, was the only person who could settle their accounts. They were literally, therefore, accounts between the plaintiff and defendant, and no body else; and as the submission was of all accounts, &c. "of whatsoever nature they might be," the co-partnership accounts as well as others were included. The demurrer therefore ought to have been sustained.

The motion to reverse the decision must be granted.

Mills for the motion.

Williams contra.

JOHN PRINGLE vs. WM. M. LANSDALE.

Upon an appeal from a magistrate to the court of common pleas, upon the determination of the appeal, execution must issue from that court, against the party cast in the appeal.

And the clerk of the court must sign the execution.

The execution is not to be issued by the magistrate from whom the appeal has been taken up.

Tried before judge Gaillard, at Sumter District, March term, 1826.

This was a rule upon the clerk to shew cause why he should not be attached for refusing to sign an execution upon an appeal from a magistrate's decree. The clerk shewed for cause, that the execution should be awarded from the magistrate's court, and that this court had no cognizance of the matter under the act of 1799.

The presiding judge dismissed the rule, and this was an appeal from his decision, on the ground that the act of 1799 directs that, on an appeal from a magistrate, execution shall be awarded from this court.

Moses, for the motion, cited the act of 1799 (2 *Faust*, 318) which orders the court to grant or award execution,

upon appeals from magistrates. The circuit court not only has appellate, but concurrent jurisdiction. How otherwise can the clerk, &c. obtain the costs of appeal? He could not send the case back and order the magistrate to issue execution for his costs. Every thing is brought up to the superior court, and how could the court send the matter back? To amend errors in a court of record a writ of false judgment lies. (3 *Black. Com.* 407. 2 *Sellon Pr.* 410. 2 *Tidd.* 1139. *Jac. Law Dic. tit. false judgment.*) It is in the nature of an *accedas ad curiam*. (2 *Sellon* 410. 2 *Tidd.* 1139.) When the parties are once in court, the subsequent proceedings in false judgment are the same as in error. (*Ib.*) So if proceedings are removed out of the county court or other court not of record, by writ of false judgment, and the plaintiff is nonprossed, the execution shall issue out of the court above. (2 *Tidd.* 911.) Executions are judicial writs issuing out of the court where the record is, upon which they are grounded; and therefore when a record is removed here from another court by writ of error and the plaintiff is nonprossed, this court will award execution. (2 *Tidd.* 912. 3 *T. R.* 657.) Where a judgment against the plaintiff is reversed on a writ of error brought in the King's bench, that court having the record before them, may in all cases, give such a judgment, as the court below should have given, and if necessary may award a writ of enquiry to assess the damages. (2 *Tidd.* 1131. 1 *Salk.* 403. 1 *Lord Ray*, 9. *Carth.* 319.) The writ of execution being founded on the record must issue out of the court of King's Bench where the record is (2 *Tidd.* 1136. (*Cowp.* 843.) Although, on a writ of error from the common pleas, a transcript only is removed into the K. B. yet the K. B. awards execution. (2 *Sell.* 387. *Cowp.* 843.)

Norr, J.—This question depends upon the construction to be given to the act of 1799. (2 *Faust*, 318,) allowing appeals from the judgments or decrees of magistrates. The act after defining the jurisdiction of magistrates, proceeds to declare, "that if either of the parties shall conceive

him, her or themselves injured or aggrieved, by the judgment, decree or sentence of any justice of the peace or quorum, where the debt or demand is for any sum above six dollars, such person or persons may have an appeal to the first court which shall be held for the district where such judgment, sentence or decree is given or awarded, upon giving sufficient security to prosecute such appeal to effect, or on failure thereof to satisfy the costs and condemnation of the said court, and the said court shall hear and determine said appeal according to the justice of the case, and award execution against the person or persons cast therein."

The words of the act are indeed so plain that there is nothing left for construction. It expressly declares that the court shall hear and determine "and award execution." The same court that hears the appeal, which is the court of common pleas, must also award the execution.

The decision of the circuit court must therefore be reversed and the clerk is directed to sign the execution.

Caldwell & Lenoir, for the motion.

Hainesworth, contra.

FELIX HOUSTON and wife vs. JAMES R. HOUSTON.

A will of personal property takes effect from the time of the death of the testator, and must be executed according to the laws existing at the time of the death.

Quere, if on questions as to the execution of Wills of real estate, relation must be had to the time of execution, or whether it must be governed by the laws existing at the time of the death of the testator?

By the act of 1824, Wills of personal property as well as real property are required to have three or more witnesses.

Tried before Judge Huger, at Abbeville District, Spring term, 1826.

This was an appeal from the decision of the ordinary of Abbeville District refusing to admit to probate a paper of-

ferred as the last will and testament of A. Houston, deceased. This paper was dated the 14th day of December, 1824, and was in form of a Will signed by the said A. Houston, but was not subscribed by any witness. A. Houston, the testatrix, died in the month of September, 1825. The ordinary decided that this was not a good Will, as it had not the number of witnesses required by the act of 1824, notwithstanding the paper had been signed before the passage of that act.

The appeal from the ordinary was on the following ground viz : that as the Will in question was dated before the first day of May, 1823, and before passage of the act of 1824, it was not governed by that act, but was a good will, without witnesses, to dispose of personal property, and ought to have been admitted to probate.

These facts were set forth in the pleadings, and the question of law submitted to the court was whether, under the circumstances, the paper in question was a good Will.

The court decided it was not.

From this decision the appellants appealed to this court, and moved to set aside the decision made by his honour, on the circuit, and relied on the same grounds as set forth in their appeal from the ordinary.

Norr, J.—This case has been submitted to the court without argument or authority. But the court is satisfied with the decision of the court below. A distinction has always been made between a Will by which land is devised and a testament containing bequests only of personal property. A devise of real estate is considered in the nature of a conveyance, and therefore can only operate upon lands of which the testator is seized at the time of executing the Will, (*Roberts On Wills*, 295-6-7 *Richardson, Do.* 57.) It would seem therefore that in the construction of such an instrument, relation must be had to the time of its execution. And yet even in that case I am not prepared to say, that so far as regards its execution, it must be done according to the existing law at the time of the testator's death.

But with regard to bequests of personal property, *mens ambulatoria est usque ad mortem*. The Will takes effect from the time of the death of the testator without regard to the time of its execution. Goods and chattels therefore which he has at the time of his death will pass under it, although he did not possess them at the time of making the will; *because they go to the executor*, and pass not by the Will but by his assent, to whom the Will is only directory. (*Richardson, 57. Banter vs. Cote, 1 Salt, 237.*) If therefore a will is not considered as having existence until the death of the testator, it must be executed according to the law at the time; and this Will, not having been executed according to the provisions of the act, which was passed previous to the death of the testator, is void and of no effect.

The motion must therefore be refused

Saxon, for the motion.

McCraven, contra.

JOHN BATES, *Sheriff*, vs. NATHANIEL GEST.

The defendant gave the plaintiff, who was sheriff, a receipt for a negro-slave levied on, to deliver the said-slave to the sheriff on a particular day, or to pay \$500. The court held, that the defendant might, to an action brought on such receipt for not delivering the slave shew that the executions under which the slave was levied on, were satisfied, and that the slave had been bought from the defendant in such executions, and that he had delivered the slave to such purchaser, or that he might shew that the slave was transferred to him, or give any other evidence to identify himself with the purchaser.

The sheriff by taking property in execution acquires a mere qualified property to enable him to execute the trust reposed in him; and whenever the object of the levy is answered or the execution is otherwise paid, the right of property in him ceases, and reverts to the original owner or to those claiming under him.

Tried before his honour judge Richardson, at Union, Spring term, 1826.

This was an action of assumpsit brought by the plaintiff, on a paper of which the following is a copy. "Received of John Bates, sheriff of Union District, one negro girl, levied on as the property of John Rochell (but said to belong to David Spivy) levied at the suit of Fanny Lee and others, which said negro girl I promise to deliver to said Bates, the first sale day in January next, or pay five hundred dollars.

(November 19th, 1823."

Nathaniel Gest."

The defendant pleaded the general issue. And secondly, that the executions under which the levies were made, were all satisfied.

The defendant offered to prove the following facts.

That on the 19th of November, 1822, John Rochell bargained and sold the above negro to Samuel Spivy, for a valuable consideration; Before that day, several executions had issued against Rochell and were levied on this negro, by D. A. Mitchell the former sheriff of Union District. The present plaintiff afterwards got possession of this negro, under Mitchell's levy. Gest then gave the above paper to release the negro; and then satisfied every execution, the date of which was previous to the day of sale by Rochell to Spivy subsequently to the 19th of November, 1822, among many other executions issued against Rochell which were unsatisfied. That Rochell being largely in debt, had mortgaged both land and negroes to a large amount, which was older than any execution. The judgment creditors filed their bill in equity, for the purpose of having all the property of Rochell sold on a credit. The court decreed and ordered the commissioner to sell the mortgaged property, and after paying off the mortgage, then to pay off the executions according to their legal priority. This was done, and sales sufficient were made by the commissioner, the application of which would have settled all the executions levied on this negro, or which were previous to the date of sale to Spivy. His honour refused the evidence offered, and held that defendant was conclu-

ded by his receipt, and even if the facts were as alleged by defendant, yet, plaintiff was entitled to recover.

The jury under the charge of his honour, found a verdict for plaintiff, for \$500, with interest.

Defendant appealed on the following grounds:

1. Because the levy being made by Mitchell could vest no property in Bates, the present sheriff.

2. Because if any property vested in Bates, under Mitchell's levy, it became divested as soon as the execution under which the levy was made was satisfied.

3. Because his honour charged the jury that nothing could excuse defendant but the delivery of the negro, or payment of the \$500.

4. Because the court charged the jury, that all the executions against Rochell bound this negro, and that the satisfaction of the executions older than the bill of sale, did not discharge the lien, and therefore defendant was liable.

NORR, J.—The sheriff by taking property in execution becomes, in contemplation of law, the legal owner. But he acquires a mere qualified property, to execute the trust reposed in him by virtue of his office. Whenever, therefore, the object of the levy is answered, the right of property ceases. If the owner of the property pays the money, the title of the sheriff is at an end, and it reverts to its former proprietor. If therefore, Rochell had been the defendant, there could be no doubt that he might have set up this defence, if there was no younger executions. But Rochell had sold to Spivy; he therefore must be considered as standing precisely in the situation in which Rochell stood at the time of that transfer. Now, I apprehend there can be no doubt, that a man whose property is under execution, may sell or mortgage that property subject to such lien, for the purpose of paying off the debt; and that incumbrance being removed, the purchaser, or mortgagee has a good title. And I presume it admits of as little doubt, that it cannot be disturbed in the hands of such purchaser, by any subsequent

executions. Spivy therefore being a *bona fide* purchaser, was entitled to the property, after the prior incumbrances were removed. His right could not be effected by any subsequent executions. I think, therefore, that the presiding judge erred in the opinion which he expressed, that the junior executions were a lien upon the property.

It is said that the present defendant is a stranger to Spivy, and therefore he cannot set up this defence, but must comply with his contract with the sheriff. That is true, but he may shew that he has delivered the property to Spivy, or that Spivy has transferred it to him, or he may give any other evidence by which he can identify himself with Spivy for the purposes of this defence. (a.) It is said no such evidence was given. But it was precluded by the opinion expressed by the court that it would have been unavailing. It would not only have been disrespectful to the court but a perfectly nugatory act to have offered the evidence, until the legal question was disposed of.

I am of opinion, therefore, that a new trial ought to be granted.

Williams for the motion.

O'Neal and Sims contra.

(a) In *Hull vs. Pickersgill*, 1 *Brod. & Bing.* 282, the court of Common Pleas in England seems to have gone farther. There "the house of the plaintiff, an *uncertificated* bankrupt, was broken open and effects acquired by him subsequently to his bankruptcy taken by the defendants, who had become his creditors since the bankruptcy, and *did not know who were the assignees* under the bankruptcy. The bankrupt having sued the defendants in trespass, they obtained, after a rule for plea, a surrender of the assignees' interest in the effects seized: Held, that this was a ratification of the seizure, and that the plaintiff could not recover," under the maxim, *omnia ratihabito retrotrahitur, et mandato æquiparentur*. But it was said by Park J. that the rule was applicable to *torts only*, and not to contracts. (See *Hagedoon vs. Oliverson*, 2 *M. & S.* 485, which was a case of a contract, also a case in the *Year Books*, 7 *Hen.* 4, 35.) "The rule of law, said C. J. *Dallas*, in the above case of *Hull vs. Pickersgill*, is, that he, for whom a trespass is committed, is no tres-

passer, unless he agrees to the trespass; but if he *afterwards agree* to it, his subsequent assent *has relation back*, and is equivalent to a command, according to the well established maxim *omnis ratihabitio, &c.*" I do not know that the doctrine of *ratihabitio* is exactly applicable to the principle decided in the text, but there can be no doubt that it has been taken from the civil law, though adopted in England as early as *Henry IV.* and in the civil law it has always been applied to contracts. From the civil law writers, I collected the following facts.

Ratahabitio or *ratihabitio*, a legal confirmation of an act originally illegal; as where the consent of a father is necessary to the validity of a marriage: or the assent of a guardian to the contract of a minor. The doctrine is treated by *Huber* in the third volume of his *Prælectiones Juris*, page 1170, *De ritu nuptiarum*. The general rule is that wherever a beneficial privilege is given by law to any one to assent or not to assent to the acts of others, he may at any time wave this privilege, and confirm as from the beginning, an act originally illegal and void. Such a confirmation has relation back to the inception of the act. Thus a marriage void for want of parental assent under the civil law, bastardizes the issue; but if that assent be subsequently given, the issue are thereby legitimized. *Quicquid est nullum, fit ab origine validum, si postea acquiescat in, in cujus gratiam lex nullitatem statuit.* This rule includes a great part of the doctrine of *Relation* of the English law. See the head *de Nuptiis* in the *Digest* and the *Code*.

R.

J. M. RYAN vs. THOMAS BALDRICK.

A distinction has been made with regard to interest between *written* and *parol* agreements. Interest is allowed in the former, when not in the latter.

Wherever an action is brought on a contract entered into for the delivery of a specific article, the value of that article, at the time fixed for the delivery, with interest, is the sum the plaintiff ought to recover.

So, upon a contract to allow an overseer 1200 lbs of cotton, on the first day of January for his years services, interest was allowed upon the value of the cotton, at the time fixed for its delivery

It seems to be implied from the breach of a *written* promise to pay money on a given day, that the party will pay interest

Where a rule, at law, is established for assessing damages, the jury are not at liberty to adopt or reject the rule, at their pleasure.

A tender of the principal, the absence of the party, or the intervention of war, it seems, are good causes for suspending the payment of interest in any case. But it is not a matter of discretion, but must depend upon some legal principle.

It seems interest may be recovered in every case of a contract for the delivery of property or the payment of money, whether express or implied.

A jury will not be permitted to give more nor less than the value of the property. They must measure their damages by the legal rate of interest.

It seems, the verdict of a jury for the value of a negro, and a further sum for his services, instead of a gross sum, though not formal, is, notwithstanding, sufficiently certain.

So, a verdict for so much for not delivering a specific article contracted for, and so much for interest, by way of damages, is sufficiently certain.

Tried before Judge Huger, at Orangeburgh, fall term, 1825.

This was an action for overseer's wages. The plaintiff produced a memorandum of an agreement in writing, the terms of which were, that the defendant, in consideration of the plaintiff's services would on the 1st January 1824, allow him 1200 lbs. cotton.

The jury allowed interest on this contract and the defendant appealed on the ground.

That no interest should have been allowed on such a memorandum.

Huger, J. before whom the case was tried, told the jury to give interest; but on his return to court after a temporary adjournment, stated to the parties, that he had done wrong, and recommended this appeal.

Norr, J.—The circuit judge I understand changed his opinion in this case, upon the case of *Knight and Mitchell*, (2 *Const. Rep. Tread. Ed.* 668.) But that was not a written agreement like the present; and a distinction has always been made with regard to interest, between *written* and *parol* agreements. (See *Gordon vs. Swan*, 2 *Campbell* 429.) It may be an arbitrary one, but it has been sanctioned by actual practice and ought not now to be changed by the court.

Every person acquainted with the situation of this country, immediately after the revolutionary war, will recollect that from the scarcity of specie and having no banks at that time, the commerce of the country was carried on almost entirely by barter. Contracts were made for the delivery of tobacco, corn, pork, and almost every commodity which the country was capable of producing. From the general prevalence of contracts of that sort it became a settled rule of decision to allow the value of the article at the time it was to be delivered, with the interest upon it as the measure of damages for the non-performance of the contract. Indeed, the law was considered so well settled, that verdicts passed and judgments were confessed in that way, and it was not thought that it admitted of a question. But as few of the decisions of that day have been reported, and contracts of that sort having in a great measure fallen into disuse, those decisions have never been known to many, and appear to have been forgotten by others. But we are not left entirely without testimony upon the point. In the case of *Davie vs. The Ex'ors. of Richardson*, (1 *Bay* 102.) *Atkinson vs. Scott*, (*Do.* 303.) and *Wigg vs. The Ex'ors. Gardon*, (*Do.* 351,) it is laid down that wherever a contract is entered into for the delivery of a specific article the value of that article at the time fixed for the delivery with interest is the sum the plaintiff

ought to recover. According to the principle decided in those cases the verdict in this case ought to be supported, and I do not know upon what principle we are authorized to depart from those decisions. They were made upon due deliberation, and by the highest tribunals in the country. But, as the question of interest has long been *questionata* in this state, I have no objection to go more at large into the subject and think these cases can be supported upon principle as well as authority. *questionata*

It is desirable that some principle should be established by which the question may be put to rest. *Campbell*, in the first volume of his *Reports* 52, says it would, fortunately, be a very difficult matter to fix upon another point of English law in which the authorities are so little in harmony with each other. Lord *Ellenborough*, in the case of *de Haveland vs. Bowerbank*, (1 *Campbell* 50,) says he wishes very much to lay down some certain rule respecting the payment of interest; that his great object was to have a fixed rule and to exclude discretion. And I concur in the opinion, that it is a subject which ought to be fixed upon some certain and stable foundation, and not to be left to the discretion of every judge, and much less to the fluctuating and capricious opinions of juries. The great object of courts ought to be to fix principles and not merely to decide cases. By tracing up the history of this subject, we shall find, that determining in what cases interest shall or shall not be allowed has always been a matter of judicial cognizance. I do not recollect a single act in the voluminous code of G. B. declaring in what cases it may or may not be recovered. There may be many, but if so they have escaped my recollection. Neither do I recollect one in this state. The payment of interest was originally altogether a matter of contract and not of legislative provision. All legislative acts have been directed to the restraining the excess of interest. There is a late act authorizing sheriffs to collect interest on executions as a matter of course. But the courts had previously determined that the jury might give

interest on judgments, and the only effect of the act was to make it recoverable without an action. There is also an act authorizing a purchaser of land in cases of eviction on a title paramount to recover back the purchase money with interest. But that was merely recognizing a rule previously established both in England and in this state; and the object of the legislature was not to authorize the party to recover interest, but to establish a rule beyond which the jury could not go in estimating damages.

We all know the prejudices which formerly existed against taking interest at all. Almost all judicial power was usurped by the clergy, who thought or pretended to think it a crying sin. The judges of the King's bench were themselves principally ecclesiastics. And when the nobles of France attempted to emancipate themselves from ecclesiastical power they excepted heresy, marriage and usury, as being of spiritual cognizance (1 *Hallam's* *id. Ages*, 466-7.) No distinction was then made between usury and interest. By the ancient canons of the church interest was prohibited to all persons having any employment in the church. The Emperor *Leo* went further, and prohibited it altogether. *St. Cyprian* reckoned it among the most grievous sins. *St. Chrysostom* said that money gained by usury and given in charity and alms was no more acceptable to God, than if it was so much received from the stewes, the price of lewdness and prostitution. But this opposition was not confined to the clergy, it was almost universal. Interest was at one time prohibited at Rome, under severer penalties than theft. (*Domat*, 123. *Ord On Usury*, 4.) The English law was not less severe (*Do.* 7.) It was considered an aggravated species of felony. Lord *C. J. de Grey* says, that before the *St. 3. Hen. 8. c. 9.*, taking of interest was prohibited by the common law, the canon law, and the ancient statutes of the realm. (3 *Willson*, 260.) *Loyd qui tam. vs. William's*. Moses was not quite so rigid. He prohibited his people to exact usury from their brethren; but they were allowed to take it of strangers.

Many reasons were given for those prohibitions. The clergy, we have seen, considered it uncharitable and sinful. *Aristotle* said that interest ought not to be required, because money does not breed. But if that sage philosopher had lived to this day he would have found, that in the hands of an enterprising merchant it is a very prolific thing. But the truth is, they had not then learned the distinction, which has since been made, between usury and interest. Governments had not begun to regulate the price of money. It was altogether a matter of contract. And the oppressive extortion of the money lenders produced mischiefs of which we have no idea at this day. *Tacitus* says it was one of the principle causes of insurrection at Rome. It was one of the principal grievances which *Solon* had to redress, when he formed his Athenian code—one which had kept many of the citizens in exile, until they had forgotten their native dialect. (*Plutarch's Life of Solon.*)

Cicero says, that the interest of money in his time was 40 per cent. at Rome, and in the provinces 48. (*Montesquieu Sp. L.* 100. In Spain it was 40 per ct. until reduced by the Emperor *Charles V.* (*Rob. Hist.*) And, in England, jewish interest, or biting interest, as *(. J. Lee* called it, was 40 per cent. and more. *Hardres.* 429.) Thus was this mighty evil extending itself all over Europe. Government had not yet undertaken to regulate the price of money. Interest was whatever the avarice of the lender might induce him to exact, and the necessities of the borrower compelled him to pay; until the people were overwhelmed with all the distress that the indulgence of such unrestrained cupidity might be expected to produce. But the state of the world is changed. By the extension of commerce the use and value of money are better understood. Interest is regulated by law and the hire of money is as legitimate a source of income as any trade or commerce. It is no longer necessary to provide expressly for the payment of interest, as we every day see in the cases of bonds, promissory notes, and bills of

exchange. But it is left to the courts to determine whether the contract is of such a nature as to carry interest; that is to say, to establish some principle which shall be applicable to all cases. It seems to be implied from the breach of a written promise to pay money on a given day that the party will pay interest. Why the same implication should not arise from the breach of a parol promise is perhaps the most difficult to discover. But a distinction appears to have been made and I am not disposed to innovate upon established doctrine.

I will now look back to our own decisions, and as far as they have gone, we are now certainly authorized to go. It is admitted, that on bonds, bills of exchange and promissory notes, interest is recoverable as a matter of course. I have shewn by the cases from *Bay's Reports*, that for the breach of a written promise to deliver any specific article interest may be recovered. It has been allowed on judgments. The *adm'rs. of Norwood vs. Manning*. (2 *Nott & M' Cord*, 395.) *Fishburn vs. Sanders*. (1 *Do.* 242.) It has been allowed in an action for money had and received, money laid out and expended, &c. *Goddard & Bulow*, (*Nott & M' Cord*, 45;) and on a replevin bond, *Stevens vs. Simmons*, (1 *M' Cord*, 38.)

It has sometimes been said that a jury may in their discretion give interest by way of damages, but that it is not recoverable as a matter of course. On that subject I have only to remark, that when it is once settled by the court that the contract is of such a nature as to carry interest, it then becomes a rule of law, and is no longer a matter of discretion. (The very object in laying down a rule is to narrow the field of distinction, and when a rule for the estimation of damages is established by law, the jury are not at liberty capriciously to adopt or reject it as they may think proper.) I do not mean to say that they must at all events give interest. There is no discription of cases where causes may not exist to suspend interest. A tender of the principal, the absence of the party, the intervention of war, &c. are good causes for suspending the payment of interest in any case. But it is not a

matter of discretion. It must depend upon some legal principle.

It is said, that if interest is recoverable at all, it cannot be so *eo nomine*, but it must be by way of damages only. That is a question on which my mind has oscillated. But when we consider the difficulties with which this subject has had to contend and the prejudices it had to encounter and the slow and almost imperceptible steps with which its progress has been marked, we ought not to be surprised that many doubts have sprung up in its course. In most of the cases, to which I have referred, interest has been expressly allowed as such. In some it has been doubtfully expressed, but in none has the contrary been expressly laid down. But why may not interest be allowed by the name of interest as well as by way of damages? Every action of assumpsit is an action for damages for the breach of a contract. Interest is always given by way of damages, yet we have seen that on notes of hand, bills of exchange and for money had and received, &c. it may be given under the name of interest. And I can see no reason why it may not be in every case of a contract for the delivery of property or the payment of money whether express or implied. The verdict is equally certain as if a gross amount of damages had been given. And when the substance is gone, why should we be anxious to preserve the shadow. Since the interest constitutes the amount of damages, and the only damages which can be given, it cannot be expressed in a more simple and intelligible form. If the law is a science, we ought to indulge the hope, that, like the other sciences, it is marching on toward perfection. And it certainly is one step towards the main object of our pursuit. Let us endeavour to finish one work as we go on, that we may not be perpetually called back to do the same thing over and over again. Let us establish principles and leave as little as possible to discretion. The principle is indeed established by the cases which I have cited, and a jury would not be permitted to adopt a different rule.

A jury would not be permitted to give less than the value of the property, as we have already decided in this court, in the case of *Wise & Freshly*. (Nor would they be permitted to give an arbitrary sum, over and above the value of the property; as for instance five or ten per cent. They must measure their damages by the legal rate of interest or nothing.) The only question is then, is the verdict sufficiently certain. On that question I apprehend there can be no doubt. The principle may be tested by the manner sometimes adopted in actions of trover. It is not unusual to give a verdict for the value of a negro, for instance, and a further sum for his services, instead of a gross sum. Such a verdict is informal, but it is, notwithstanding, sufficiently certain. So if a jury should give a verdict for the value of a negro and his services for three years, at the rate of one hundred dollars per year, I presume the court would not grant a new trial, on the ground of such informality. If therefore the verdict in this case is informal, it is not uncertain and may be supported. The motion therefore must be refused.

Glover, for the motion.

Felder, contra.

(a.) If the reader is curious to know more about the absurdities in the Old English law in relation to usury, let him look at *Glanville*, Book, VII. ch: XVI. page 185 of *Beames' Ed: and Beames' note*, (1) to that page. The controlling maxim was, *quod usuria radix omnium vitiorum esset*.

**C. DeGraffenreid vs. DANIEL A. MITCHELL late Sheriff
et. al.**

Where a parent suffers property to go into the possession of a child upon marriage, it is *prima facie* evidence of a gift

A man's house may not be broken open to take his own person or one of his family or his goods under an execution; but the sheriff upon request and denial may break the house and do execution upon the body or goods of a third person.

A man's house is not a castle or defence for any other person, but for the owner, his family and goods, and not to protect another who flyeth into the same.

So, where the slaves of a third person were concealed in the plaintiff's house, it was held the sheriff might break open the doors to take them in execution, upon request and refusal to deliver them.

This was an action of trespass *vi et armis*, to recover the value of four negroes and for breaking and entering plaintiff's house. It appeared that the defendant Mitchell, as sheriff, had levied on the negroes in dispute as the property of one James V. Thomas, against whom he had sundry executions, and had possession of them some time. Plaintiff set up a claim to the negroes and by some means got them into his possession. Mitchell immediately made search for them and went to DeGraffenreids, where he supposed they had gone. When he arrived at DeGraffenreids, he enquired for him, when he was informed that he was not at home. Defendant told Mrs. DeGraffenreid his business; she said the negroes were there; Mitchell requested her to open the door of the room where the negroes were, which she refused. He then said he would have them, if he had to break open the door, and attempted to open the door, which was fastened; he then kicked the door two or three times and injured or spoiled the lock, and entered and found the negroes concealed. He then took possession of the negroes.

The defendant pleaded the general issue and a special justification, under sundry executions which had issued out of the common pleas for Union district in favour of —————

He had other executions against the said James V. Thomas, and insisted that the negroes in dispute belonged to Thomas, having, as defendant contended, been given by plaintiff to his daughter, the wife of the said Thomas, which was the question upon which the whole case turned. The case went to the jury, and under a strong charge, in favour of the defendant. They found a verdict for the plaintiff for twenty-five dollars; from which the defendant appealed, and moved to set aside the verdict.

Herndon for the motion;—Said no declarations, but those made at the time a parent suffers negroes to go into the possession of a daughter upon marriage, can be admitted to shew upon what condition the delivery was made; which delivery is always to be considered a gift; unless such contemporary condition of loan &c. was attached to the delivery. He cited 1 *Esp. N. P. 2d part*, 277–293.

NOTT, J.—Several questions have arisen in the progress of this cause which it is not now necessary to notice. The only two questions on which the court consider it necessary to express an opinion are:

1st. Whether the plaintiff established a right of property in himself?

2nd. If he did not, whether the defendant had a right to break the door for the purpose of getting possession of the negroes?

It appeared in evidence, that the plaintiff had given, or lent as he pretended, these negroes to his daughter, at the time of her marriage, with James V. Thomas. They had been in the possession of Thomas and claimed and used by him as his own for two years. In the mean time he had become very much involved. Judgments were obtained and executions issued against him, by virtue of which the defendant as sheriff of Union district had taken them into his possession. The plaintiff had decoyed them away and this action was brought for a trespass in retaking them in the manner set forth in the report. It now became a question

whether the plaintiff had loaned or given the negroes to his daughter. Questions of this sort have so often occurred in our courts, and the law is now so well settled on the subject, that it would be cruelty to the public to suffer a doubt to be raised, whether such a transfer of property did not amount to an absolute gift. The former suit also between these parties appears to have been conclusive of that question; for it is admitted that the defendant then recovered the value of these negroes. The record therefore in that case ought to have been received as evidence in this. Indeed the verdict in this case repels the idea of the right of the property in the plaintiff. For if the property had been his he ought to have recovered its value. The whole case therefore resolves itself into the question, whether, under all the circumstances, the defendant was authorized to break open the door to retake the property?

It is said in *Lemaynes case*, (5 Co.) that the sheriff at the suit of a common person, upon request made to open the doors and denial thereof, ought not to break open the door or the house to execute any process at the suit of any subject, or to execute a *feri facias*, but if he do he is a trespasser. Yet it was resolved that the house of a man is not a castle or defence for any other person but for the owner, his family and goods, and not to protect another who flyeth into the same, or the goods of another; for then the sheriff upon request and denial may break the house and do execution. A distinction is attempted to be made between the case before us and the one in *Coke*. That the sheriff was not about to execute the process, but to retake the goods after they had been in execution and had in contemplation of law become his own. But the principle is the same, except that this is a stronger case, the goods being in the custody of the law. The house of every man says Lord *Coke* is to him as his castle and fortress, as well for his defence against injuries and violence as for his repose. And the reason is, *domus tua cuique est tutissimum refugium*. But the principle is not to be extended

beyond the object which the law intended to effect. The house or castle of a man is to be a refuge for himself, a place of safety for his goods, and of repose for his family. But that immunity is to be allowed only to the owner himself. It is not to be a sanctuary for others. It does not appear that the sheriff was guilty of any rudeness to the family, or that he used any unnecessary force or violence. I concur, therefore, in opinion with the presiding judge, that he was guilty of no trespass, and that the verdict ought to have been for the defendant.

A new trial is therefore granted.

Herndon for the motion.

Williams contra.

U. J. HARRINGTON, *clerk* vs. JOHN B. COLE.

The legislature by giving the court of Common Pleas authority to appoint guardians, did not transfer to that court all the powers of the court of equity connected with the subject, and it has no power to call them to account.

Executors, administrators and guardians all stand in the same relation of trustees, and their transactions are only examinable in a court of equity, or some other court specially authorized to examine and adjust their accounts.

Where a guardian is appointed by the ordinary he has jurisdiction over the subject, but a very inadequate one, as he cannot compel obedience to his decrees; and his proceedings may be examined by a court of equity. But the court of law cannot take cognizance of the matter.

What was said in *Anderson vs. Maddox*, that "if the plaintiff (in action on a guardianship or administration bond) set out the condition of the bond in his declaration, and assign a specific breach, so that it shall appear to the court, that no enquiry into the state of the defendant's accounts will be necessary, an action might be brought on the bond in a court of law," said to be an erroneous impression thrown out by the court; as the plaintiff cannot by his manner of assigning the breach, restrict the defendant in the nature of his defence

An action cannot be maintained on a guardianship (or administration) bond although the guardian has been cited to account, but has failed to do so.

Tried by judge Waties at New berry Spring term, 1826.

This was an action of debt on a guardianship bond. The presiding judge ordered a nonsuit on the ground: that the proper remedy in this case was in the court of equity where only full relief could be had against all persons in a fiduciary situation. The assigning here as a breach of the bond that the guardian had received a certain sum of money was not sufficient to give jurisdiction to a court of law; for the guardian standing in the relation of a parent to a minor had the power (and it was his duty) to lay out the funds of the minor in all reasonable expenses for his support and education, and the discreet expenditures of these was only examinable in a court of equity which had the peculiar cognizance of all trusts. The plaintiff now appealed and moved to reverse the decision and to reinstate the case on the docket, and for a new trial on the following grounds:

1. Because the action was correctly brought, and the whole of the pleadings on the part of the plaintiff strictly conformable to the rules and forms of the law, and that in them a breach of the condition of the bond was correctly set forth and a proper issue presented.

2. Because the correct remedy was in a court of law. by an action of debt on the bond; inasmuch as a citation had been issued to summon the obligors to account, but they had failed to do so, and the proof was conclusive that the principal obligor, who was the guardian, had received a considerable amount of the money of the wards, and there was not the slightest proof that he had expended any of it in their maintenance and education, and of course could have no account; and if he could have had any account he failed to present it when required, and therefore there was a plain and adequate remedy at law.

3. Because the decision of his honour the circuit judge was contrary to the principles of law, and the precedents of pleading.

J. J. Caldwell, said the act of *William III*, would admit of such an action as this. A specific breach is set forth.

As many may be assigned as the plaintiff pleases. The condition of the bond admits of the statement of the breach. But it is said no proof was shewn, or no statement made in the breach, that the obligor *had been required to account*. But that was not necessary, for here the obligor ran away, and it was evident therefore that he had never accounted. He referred to the act allowing damages to be assessed by the jury upon bonds conditioned to perform covenants.

Dunlap, contra.—Several breaches were assigned, but evidence was only offered to prove that M. G. Cole, once received about \$150, for these children. That was the whole evidence. This defendant is surity only, and liable only if the principal be *required* to account and it is not done. The surity has nothing himself to do with the accounts. A citation was first issued, 18th March, 1825, and the time to account was so short, it was impossible to have complied with the citation. This writ was issued immediately after. He cited *Maddox vs. Anderson, ante*, 257, to shew that no action can be supported on a guardianship bond, at law, until the guardian is called upon to account.

NORT, J.—This question has already been decided in the case of *Anderson vs. Maddox and others*. Executors, administrators and guardians all stand in the same relation of trustees, and their transactions are only examinable in a court, of equity, or some other court, especially authorized to examine and adjust their accounts. Where a guardian is appointed by the ordinary he has jurisdiction over the subject, but a very inadequate one, because he has not the power to compel obedience to his decrees. His proceedings are generally *ex parte* and therefore may be examined in a court of equity. But a court of law is utterly incompetent to administer justice in such a case.

The difficulty has arisen from the act of 1809. (1 *Brevard*, 231.) authorizing the court of common pleas, to appoint guardians in particular cases. It is the necessary result of transferring a portion of the jurisdiction belonging to one

court to another not having the means of exercising a complete jurisdiction over the whole subject. The act merely authorizes the court to appoint guardians in the single case of the division of estates under the act of 1791. It does not give the power to call them to account. And I cannot perceive in what way that court could exercise such a power. The judge cannot perform the duty in person, because he must then usurp the province of the jury in the trial of the facts. He cannot search the conscience of the party in the manner required by the court of equity. It cannot be done by a reference to the clerk, because then the jury must found their verdict on his report and not upon evidence as they are sworn to do. It must be apparent therefore that the court of equity is the only tribunal competent to the performance of such a duty. And that the legislature did not intend by giving the court of common pleas authority to appoint guardians to transfer to that court all the powers of the court of equity connected with the subject.

The opinion of the court in the case of *Anderson vs. Muddox and others*, was delivered by myself. And I have there said that "if the plaintiff set out the condition of the bond in his declaration and assign a specific breach, so that it shall appear to the court that no enquiry into the state of the defendants accounts will be necessary I see no objection to maintaining the action in a court of law." I think, however, that I did wrong to hold out the encouragement which that observation afforded, to attempt to give jurisdiction to a court of law in such a case. For the plaintiff, cannot by the manner of assigning the breach, restrict the defendant in the nature of his defence. I think therefore the safest way will be to turn all those cases over to the court of equity.

And indeed by a reference to the proceedings in this case it will be seen that the replication in which the breaches are assigned is more in the nature of a bill in equity than a plea in a court of law, and that the breaches are not and could not be so assigned that issue could be taken upon them in the

distinct and precise form required by the rules of pleading.

The opinion therefore of the circuit judge must be supported and the motion to reverse the decision refused.

Caldwell, for the motion.

Baustett & Dunlap, contra.

CHARLES J. COLCOCK *Exor.* of ROBERT REID vs. ROBERT GOODE & JOHN ROSE.

The doctrine of implied warranty arises as well on a contract for hire as upon the sale of a slave.

If a person sell a flock of sheep or drove of horses, the law will not imply a warranty that every member of the flock or drove was sound; but that taken in the aggregate they were so.

The same rule will apply to the sale or hire of a gang of slaves. The extent of a warranty implied, in such case is, that as a body they are ordinarily good, and have not been picked and culled for the purpose of deception.

So, where at a letting to hire by auction, by an executor, the defendant bid off six slaves at \$480 per annum, without any stipulated price as to any of the number, and no particular representation of the qualities of any one of them, he will not be allowed to set-off the value of the services lost by one of the slaves, who was in bad health and incapable of doing as much as if he had been well.

A warranty has never been implied, in any case, of any thing more than *soundness* and *title*; to make a vendor further liable there must be either fraud or an express warranty.

So, where upon the hire of several slaves, without any particular representation of the qualities of any one of them, for an aggregate price, the law will not imply a warranty that one of them was a carpenter.

Tried before judge James, at Barnwell, April term, 1826.

This was an action of assumpsit on a note or agreement, of which the following is a copy: "On or before the 1st January next we or either of us promise to pay Charles J Colcock, executor of the estate of Reid, four hundred and thirty dollars for the hire of Sam, Silvia, Big Peter, Dorcas, Savannah and his wife for one year from this date, and we

bid ourselves to tax, feed, shoe, and clothe them and to pay doctors bills and to deliver them in this place on the first Monday in January, 1823."

Coosawhatchie, January 17, 1822.

Robert Goode.

John Rose.

\$436 endorsed) 1822, Sept. 10. Received fifteen dollars in part.

C. J. Colcock."

The execution of the agreement being admitted on the part of the defendants they went into the defence.

Benjamin Coleman testified that he lived with the defendant Goode the latter part of the year 1822. Cavannah was a jobbing carpenter; he was often unable to work. He appeared to be ruptured. His hire was worth but little. Nothing of consequence. If sound he would have been valuable.

Benjamin Cross said he lived with Goode, three, four, or five months of the latter part of the year, Cavannah did some work; about half work. A good carpenter would hire for about \$150 per year.

William Wooton said, he thought defendant hired Cavannah as a carpenter. On bringing him home defendant brought him to the mill, and put him to work as such. Tho't Cavannah worked about half his time. He complained of his arm, and witness thought him ruptured. A good carpenter was worth about \$150 per year.

Cross-examined—Witness did not know whether Cavannah was hired as a carpenter or not, witness commenced living with defendant in February, 1822.

D. Ford, proved that the day after the defendant bro't Cavannah home, he put him to work as a carpenter. A few days after, Cavannah complained of being sick. Witness examined him and he was in a bad way. He could not retain his urine, nor lift. From February till July he did not work half his time.

Chisolm was present, the negroes were hired out at public out-cry at Coosawhatchie.

His honour the presiding judge in his charge to the jury told them that they might presume, that the negro man Cavannah was hired as a carpenter at an adequate price, and that on the principle, that a sound or adequate price warranted sound property, they might make a deduction according to what a negro of that character if sound was worth.

That the presumption arose from the acts of the defendant, who brought Cavannah to his mill and put him to work as a carpenter immediately, while he sent the other negroes to work in the field at a considerable distance. He said he did not think the doctrine, that a sound price required a sound property should be much extended, but if the jury were of opinion that the value of a carpenter of that description was \$150 per year, and Cavannah worked but half his time they might find half his worth. That there was no evidence upon what terms defendant made the payment of \$15, but being made before the note was due and for so small a sum it was not conclusive against defendant's defence.

The jury accordingly found a verdict for the plaintiff for \$340 with interest from the first January 1823, allowing the defendants a discount or deduction of \$75.

The plaintiff moved for a new trial.

1st. Because there was no evidence to warrant the jury in making a deduction from the note.

2nd. Because in as much as the defendants failed to prove that they were to give more than \$72 for the hire of Cavannah, and proved that his services were worth \$75 the verdict was contrary to evidence.

3rd. Because there was no evidence that Cavannah was hired other than as an ordinary half hand.

4th. Because his honour the presiding judge mistook the evidence and law, in charging the jury, that they might presume that the negro man Cavannah was hired as a carpenter at an adequate price, and that on the principle that a sound or adequate price warranted sound property they might

make a deduction according to what a negro of that character if sound was worth.

NOTT, J.—I concur with the presiding judge in this case that the doctrine of implied warranty arises as well from a contract of hire as on the sale of a slave. And that it must be applied in the one case precisely as in the other. On this subject we cannot derive the same assistance from the English decisions as in most other cases; because the English judges do not recognize that principle of the civil law to the extent that we do, that a warranty of soundness is to be implied from the price paid for property. It is only where there is actual fraud or an express warranty that the vendor is there held liable.

In policies of insurance, however, even the English judges have adopted the civil law rule. Every person offering a vessel for insurance is considered as warranting the soundness or sea-worthiness of the vessel, without any express stipulation to that effect. But it is not therefore understood that every spar, rope and bolt is perfectly sound. The enquiry always is, whether taken in the aggregate the vessel is able to sustain the ordinary perils of the sea. The same rule must apply to the sale of property where the principle of implied warranty is admitted. If a person should sell a flock of sheep or a drove of horses the law would not imply a warranty that every member of the flock or drove was sound. But that taken in the aggregate they answered the description that was given of them. The same rule will apply to a gang of negroes. The extent of the warranty implied is, that as a body they are ordinarily good and have not been picked and culled for the purpose of deception.

Let us now apply the rule to the case under consideration. An executor has set up the negroes of an estate for hire at public out-cry. The defendant bid off six of them at four hundred and thirty dollars. There was no stipulated price with regard to any particular one of the number. There does not appear to have been any particular representation of

the qualities of any one of them. If therefore one of the gang had been entirely worthless, if the other five were worth the money given, the defendant would not have been entitled to any deduction. The implication of warranty arises from the hire. And where a gross sum is paid, the warranty is considered as applying to the whole gang and not to any particular member of it. The rule therefore adopted in this case is not only an entirely mistaken view of the principle, but if carried to the extent to which it is susceptible, would be subversive of the principle itself.

There was no evidence in this case that the negro in question was represented as a carpenter. "That presumption" (says the presiding judge,) "arose from the acts of defendant who brought Cavannah to his mill and put him to work as a carpenter, immediately while he sent the other negroes to work in the field at a considerable distance." A deduction was therefore made, which amounted to something more than the average price of all the negroes.

Now suppose all the other negroes had been employed in some particular trade or occupation, and had been found unqualified. It would have furnished the same presumption that they were thus recommended and would have entitled the defendant to a similar deduction. The consequence would have been, he would have paid off his note and brought the plaintiff somewhat in debt after having had a year's service of the negroes.

But if it had been proved that Cavannah was represented as a carpenter the presumption would be that his services had been estimated in the contract as equal to the average price of the other negroes which was actually less than the jury have now allowed. It therefore furnished no ground for a deduction.

But we have never suffered a warranty to be implied in any case of any thing more than soundness and title; to make a vendor further liable there must be either fraud or an express warranty. There was no express warranty in this case

hat Cavannah was a carpenter and it ought not to have been implied.

A new trial must therefore be granted.

Patterson for the motion.

Martin contra.

BAKER WILKINS vs. ENOS TART.

By the act of 1787, persons who claim lands by *grant, previous to the 4th July, 1776, or by five years possession previous to that time, are exempt from the operation of the escheat laws.*

If the statute of limitations has run against an individual before his death, the escheat laws, after his death, cannot operate against the individual who has acquired a title by possession.

When escheated lands, by act of assembly, are vested in the trustees of a public Academy, they may be barred by the statute of limitations.

Tried before Gaillard J. at Marion district, Spring Term, 1826. Trespass to try title.

The plaintiff claimed under a grant to Jordan Gibson, dated 23rd June 1772, and produced a regular chain of title, through several persons to himself. The grantor and those who claimed under him had been in possession of the land at different periods, from the time of the grant to the time of the conveyance to the plaintiff. And although it did not appear that they had actually occupied the land during the whole of that time there was no evidence of any adverse possession.

The defendant claimed under a grant to one J. Walker dated the 13th September, 1730. The record of an escheat commenced in March 1815, and decided in the year 1817, and a title from the escheator, 23rd February 1823, for 650 acres, which covered the land in dispute. The plaintiff also proved that he had been in actual possession for twelve or fifteen years previous to the commencement of this action. Some short time before this action was commenced the defendant had dispossessed the plaintiff, and this action was brought to regain the possession.

The act of 1787, (1 *Brev.* 303) provides a method by which inquests shall be made respecting lands which have or shall escheat for want of heirs, and requires an escheator to carry the act into effect. By one of its provisions it is declared, that no lands claimed under a grant or under an actual possession for five years, prior to the fourth of July 1776 shall be affected by this act. sec. 9, 1 *Brev.* 306.)

The presiding judge instructed the jury that by this section, the plaintiff's land was exempt from the operation of the act.

And also that he was entitled to hold the land under the statute of limitations.

The jury found a verdict for the plaintiff, and this was a motion for a new trial on the following grounds:

1. Because before the plaintiff could make out a title under the statute of limitations he ought to have shewn that there was some person alive during the possession which he relied on to complete his title, against whom the statute could run.

2. Because in this case the statute of limitations could not apply, the right of the land being in the State, from the death of the person last seized without heirs, there being no evidence to shew that the statute had run before the death of such person.

3. Because his honour charged, that the possession of the plaintiff was continued &c.

4. Because his honour in charging, that the rights of the plaintiff were protected by a proviso in the escheat law, when the section of the law referred to, only relates to land which had become escheated and held under grant or possession five years before the year 1776, and there being no evidence to shew when the lands became escheated.

5. Because his honour erred in charging, that the 14th section of the escheat law related only to the mode and manner of making inquest and not to the principles of the act before laid down.

5. Because his honour erred in charging that the rights of the State did not attach until office found.

Wm. Mayrant, for the motion.—No evidence when John Walker died and the plaintiff could take no benefit under the escheat law, or of the statute of limitations, unless that (1 *Brev.* 305. sec. 9. *Escheat*,) fact be first fixed. The rule of *nullum tempus* applies here.

Evans, contra.—This was a very plain case of title made out by the statute of limitations. Gibson had acquired a title by possession before the escheat law. He had had fourteen years previous possession. Until office found land is not vested in the State, but is regarded as still the property of that person, and his heirs, who formerly held it.

NOTT, J.—The two grounds on which the defendant relies for a new trial are distinct and independent of each other. If therefore, the presiding judge was correct on either, the motion must fail. And my opinion is that he was correct on both. The revolution in property, as well as the revolution in government, which was produced by the separation of the United States from the mother country, introduced a state of things for which in many respects no other country can furnish a precedent. Many persons never took possession of lands to which they were entitled, or abandoned their possessions and have never preferred their claims since. Others lost the evidence of theirs, and therefore were deprived of the means of prosecuting their rights, where they were so disposed. To remedy the evils which might result from such a state of things, two acts were passed in the same year. One providing that an actual purchase and quiet possession of land, five years previous to the fourth day of July 1776, shall be deemed a good and sufficient title, and any grant obtained since that time or which may be obtained for said land is declared null and void. (2 *Brevard* 7) The other the act already noticed exempting from escheat lands claimed under grant or under an actual possession for five years prior to the 4th July 1776.

It is now contended that this act exempts only such lands as were *granted* five years prior to that time. But, taking the two acts together, it will be seen that they lead to a different conclusion. The object of the escheat law was to leave undisturbed all titles acquired prior to the revolution. Therefore whether a person claimed title by grant obtained prior to the fourth of July, 1776, or by five years possession previous to that time, which was tantamount to a grant, in either event, he was not to be affected by the act.

The plaintiff therefore holding under a grant prior to 1776, was entitled to the benefit which the act was intended to confer,

But even if he was not protected under that act, the statute of limitations afforded him a shield. The grantee and those claiming under him had been in the enjoyment of the land from the time of the grant to the time the plaintiff was ejected by the defendant. And though there were occasional intervals in which it was not in the actual occupation of any one, yet it was not occupied by any other person nor does there appear to have been any adverse claim.

If, therefore, Walker was alive, and there was no evidence of his death until the year 1815, when the inquest was commenced, his right of action was barred before that time. If he was dead then the land was vested in the trustees of the Marion Academy, by the act of 1814, which transferred to them all the escheated land in the district. And the defendant was protected by his own possession against their claim, before the commencement of this action.

I concur, therefore, with the presiding judge on both grounds, and the motion must be refused.

Evans, Sol. for the motion.

Mayrant contra.

THE BANK of the STATE vs. EDWARD CROFT, Indorser.

Every renewal of a note is a discharge of the prior note; because the renewed note is a substitute for the former.

Where a note, to which the defendant was indorser, had become due, in bank, but had by mistake been consolidated with a note of the drawer with other indorsers, by the attorney in bank of all the parties who was authorized to *renew* their notes, and the note, which defendant had indorsed, was suffered to remain in bank a year, before the mistake was discovered, and then his agent renewed the note again, it was held that the defendant was not liable, as the subsequent renewal was irregular, and no notice of demand on the drawer and non-payment of the first note having been given to the defendant or his agent.

Tried before judge Huger, fall term, Richland district, 1825.

This was an action of assumpsit, on a promissory note, for six hundred dollars, payable to the defendant or order. Plea non assumpsit.

It appeared, that on the first of March 1822, a note drawn by Robert Singleton, payable to defendant and endorsed by him, had been discounted by the branch bank in Columbia, and was then due. On the same day another note, drawn by the said Singleton, and endorsed by R. English and Pressly Garner, was discounted by the bank. The note endorsed by Croft was entered up as paid. On the third of May, the note endorsed by English and Garner was renewed for five hundred dollars. On the 5th of July, a note for thirteen hundred and fifty dollars drawn by Singleton, and endorsed by English and Garner was discounted. This note it seems was regarded as a renewal of the note for five hundred dollars and another with the same drawer and endorsers; which note of thirteen hundred and fifty dollars was renewed in full, with the same drawer and endorsers, until the 13th June 1825, when English and Garner insisted that they were only responsible for ten sixteenths of the thirteen hundred and fifty dollars of the note, and ought not to be made to pay up the other six sixteenths, which had been improperly amalgamated with their note. On investigation

it appeared, that the note due on the first of March 1822, for six hundred dollars, and endorsed by the defendant, had been posted in the books of the bank, as endorsed by English and Garner, in consequence of which Dr. Green, who was the attorney of Singleton as well as of English and Garner, put in the note of the first of March 1822, drawn by Singleton and endorsed by Singleton and Garner. No notice had been given to the defendant in person or to his attorney, that the note due on the first of March was not paid. On the contrary it was entered up in bank as paid, And the defendant was informed in the Spring of 1823, when application was made by him for that purpose, that he was not indebted to the bank, either as drawer or endorser. After this, Singleton absconded, when on the application of English and Garner, in 1825, to be released from the payment of six sixteenths of the note for thirteen hundred and fifty dollars it was discovered that Dr. Green, misled by the books of the bank, had substituted a note of Singleton's, endorsed by English and Garner, for one of Singleton's endorsed by the defendant. English and Garner were discharged, and Dr. Green drew another note in the name of Singleton and endorsed it in the name of the defendant. Dr. Green had power only to *renew* the note endorsed by defendant for Singleton. The court regarded the note of March 1822 as paid, and the defendant not bound by the unauthorized act of Dr. Green in 1825. A nonsuit was ordered.

Preston, thought the judge had no right to poll the jury after they had found their verdict.

Contended the renewal was within the power, which was to sign his name to all notes, as drawer or indorser, *intended* for renewals of notes previously given to the bank.

Green acted as director and agent. As director he had access to the books, not as agent. The mistake was made by Hayne the Cashier upon the Entering Book; and Green, he admitted, may have been lead into the mistake by these books. It is enough that there was a clear mistake,

which he contended would not exempt the defendant, and the sole question was whether a note put in so long after the former could be considered a renewal? Does intervention of time destroy the character of a renewal? He thought not. It was the question to be determined.

Black did say that the *substitution* of the other note by mistake was *paying* the former note; but he thought the same might be said of every note. The renewal of the note is the payment of the former note, by the renewal. Besides the directors, when they discovered the error, entered the note in question as a renewal, which shews the opinion of that board was, that it was a renewal, and they are the best judges of that fact, as it is a question of fact depending upon the practice of the bank. The power of attorney was not limited to any particular time. There can be no question of his power existing to *renew*, and he considered this a renewal.

Besides the power given, is, to sign any note *intended* as a renewal. Take the case of a protest, and after a week, month and so forth it may be renewed. It is the common practice. Notes are sometimes renewed a month or two after protest, as accidents often cause protest, which when explained the note is suffered to be renewed, the back interest and protest being paid up.

Did Garner and English become responsible? no; for Green had no right to give an original note for them; and as to them, it was an original, so that the case stands as if there had been no renewal but the note lost by mistake, for a year, and after the mistake detected, might not a renewal of it have been given by the attorney or by the party himself? Dr. Green being agent for both sides must be considered as having had notice of the nonpayment of the joint note indorsed by Croft. It is to be presumed that he being a director had notice of nonpayment, and as the note of English and Garner was given by Green the agent by mistake, it will be regarded as intended to pay the other and shew thereby notice of nonpayment of the note Croft

endorsed, and which had not been regularly renewed. Any renewal Mr. Croft might have made, his attorney might make. And the question is could Croft have renewed it upon discovery of the mistake? If Mr. Croft upon discovery of the mistake put in a similar note, to continue the debt, then it is a renewal, for it is a note similar to a former note; exactly like it, it may be said, and given for it; which he conceived to be a renewal. The length of time which may elapse, cannot determine the question whether renewal or not.

The bank made the mistake as well as the agent, and therefore the bank officers telling Croft, before the mistake was detected, that his name was not in bank can have no weight. Croft was bound in morality to renew, and therefore his agent's renewing was valid.

This was a fact, however for the jury, and the court had no right to order the nonsuit at any stage of the proceeding. The matter of discharge is always for the jury. (1 *Cranch* 200.) Where the discharge is by implication or upon circumstances it must be left to the jury and is not for the court.

Gregg, the power of attorney, does not give power to renew *all* notes, but only such as he *owed* in the bank, and the question is, did he owe any note in the bank at that time. He had not been protested on the last note and had no notice, therefore he did not owe any note in the bank when this pretended renewal was made. The power is to *receive* notice, not to *waive* notice. Seems a clear case that he did not owe the note on both grounds. Not similar to a case of a drawer, the indorser is only liable upon express conditions, which conditions here have not been complied with. In the case in *Cranch*, there was notice to the drawer. If the court sees the jury clearly cannot give a verdict, they may support the nonsuit made below.

Preston in reply.—The power speaks of all notes which he now owes or may owe in the bank, therefore the power is to the utmost extent of renewals.

NOTT, J.—It appears that Robert Singleton gave two notes, but at what time or for what amount is not stated. One was payable to the defendant Edward Croft, and endorsed by him for discount in the bank of the State. The other was payable to R. English and P. Garner, by whom it was endorsed for the same purpose: By some mistake of the cashier the two notes were posted in the books of the bank, as endorsed by English and Garner. Dr. Green was the agent of all the parties, and authorized to renew any notes which they owed in bank, either as drawers or endorsers. By thus consolidating the two notes the name of Croft, as endorser, was omitted. This consolidated note was renewed by Dr. Green with Garner and English as endorsers for more than a year before the error was detected. When the mistake was discovered Dr. Green renewed the two notes in their original form, one endorsed by English and Garner, and the other by Croft. In the mean time Croft had applied to the bank to know whether he owed any thing to the bank, either as a drawer or endorser, and was informed that he did not. Singleton had left the State. Upon application being made to the defendant for payment, as endorser of this last renewed note, he refused and contended that he was discharged, and that the last renewal by Dr. Green was unauthorized. This was an action brought against him as endorser. The court regarding the first note as paid, and the last renewal unauthorized, ordered a nonsuit. This is a motion to set aside that nonsuit.

I do not consider the original note in this case as paid. Every renewal is a discharge of the prior note, because the renewed note is a substitute for the former. But this note was not renewed. The consolidation of the two notes was unauthorized and therefore could not be a renewal of this. The note on which the defendant was endorser still remained, and does to this day remain obligatory upon Singleton. Whether the endorser was exonerated is another question. That note must be considered precisely as if no renewal had

been attempted. Now the law on that subject is, that when note falls due, application must be made to the drawer, and notice of non-payment given to the endorser. And without such demand and notice the endorser is exonerated. The presiding judge in his report says, "no notice had been given to the defendant in person or to his attorney, that the note due on the first of March was not paid, on the contrary it was entered up in Bank as paid." The failure of the bank to demand payment of Singleton, when the note became due or of his agent exonerated the endorser. The subsequent renewal therefore was irregular and could not make the defendant liable. It is said that the presiding judge was mistaken in supposing that the note was entered up in bank as paid. But that is immaterial. Suppose it to have been passed over unnoticed, which I think is the light in which it ought to be considered, still the endorser was discharged, no demand having been made of the drawer for more than a year. The nonsuit was therefore properly ordered and this motion must be refused.

Preston, for the motion.

Gregg, contra.

ELIZABETH CARSON vs. W. G. RICHARDSON.

Where a friend of a defendant, with a view to procure indulgence for the defendant, paid part of the judgment against the defendant to the plaintiff's lawyer, upon condition that no credit should be given on the judgment, but the judgment to be assigned to the person, so paying the money, as a security for the money advanced, the court refused a rule upon the plaintiff's attorney to compel him to enter a credit upon the judgment for the amount he had so received.

Tried before judge Gaillard at Sumter District, May 16, 1826.

In this case the following rule was served upon W. Mayrant: "On motion of *Evans* attorney for the junior creditors, *It is ordered*, That William Mayrant, the attorney for the plaintiff do shew cause on Thursday next, why he should not enter satisfaction on the above case for the sum of \$1112 58 cts. paid to him by John S. Richardson, in part of the above case, on the 15th June 1821." To which he made the following return upon oath. "That being required by the plaintiff some time in 1821, to raise and collect the amount of interest due on the above stated case, he met and saw John S. Richardson at the court of appeals in Columbia in the same year. That he informed the said John S. Richardson of the same, and that the deponent did not believe the defendant could pay the amount without its distressing him or causing him to make a sacrifice of property. That the said John S. Richardson, then replied, he supposed he must pay it, and he supposed he would have to pay the whole amount of the judgment and would take an assignment. But he would endeavor to procure as much indulgence from the plaintiff for his brother the defendant as he could. The said John S. Richardson then made an arrangement for paying to this deponent the amount of interest due on the said judgment, which was the sum of \$1112 58 on the 15th June, 1821. That this deponent drew an order on the said John S. Richardson for the said amount. And this deponent further says, that before the said John agreed to pay this amount he said, this deponent as attorney must make such an entry in his books

as would preserve the lien of the said John S. Richardson on the judgment for the amount to be paid by him, to which this deponent assented. And this deponent further says that some time in May last, being called upon by the said John S. Richardson, he, deponent, as attorney, gave the said John S. Richardson an assignment of the judgment for the amount paid; and this deponent further says that with a view to preserve the rights of the said John S. Richardson on the judgment and execution, he never entered any credit on the same for the amount paid by the said John S. Richardson.

Sworn to before me

Wm. Mayrant."

Robert Bradford, q. v.

On hearing this return, his honor the presiding judge dismissed the rule. From this decision a motion was now made to reverse this order, and to make the rule absolute, on the ground that he who voluntarily pays the judgment debt of another without taking an assignment of it, is a simple contract creditor, and in this case the assignment being made by the attorney, and four years after the money was paid, cannot place J. S. Richardson's claim to be repaid his advancement on any higher footing, than as a simple contract debt.

Evans, Sol. for the motion.—When money is paid in satisfaction of a judgment, no matter by whom, the judgment is extinguished. It is so whenever the plaintiff cannot revive the judgement by *scire facias*. But the plaintiff being satisfied, the judgment became a nullity, and could not be assigned. This to be sure was a payment *pro tanto*, and *pro tanto* the judgment was extinguished, and judge Richardson cannot consider himself the judgment creditor for the amount he paid. He can only stand towards Mrs. Carson as a simple contract creditor.

Besides, an attorney cannot assign a judgment. He may collect, but cannot assign. And, Mr. Mayrant was not acting as Mrs. Carsons attorney, but as agent for judge Richardson. Mrs. Carson does not claim this money. It is

between judge Richardson and creditors, and he must stand as a judgment creditor, or his lien is inferior to theirs. Indeed he has no lien and must be postponed.

W. F. DeSaussure contra.—Things, the converse of the positions taken by the counsel for the motion may be assumed. The debtor may pay in what manner he prescribes. It was expressly stated by judge Richardson and so said by Mr. Mayrant, that the money so paid was not paid on the judgment. The fund of the creditors has not, nor will be diminished. The payment, was not made of Wm. G. Richardson's property; therefore the creditors cannot complain that their debtor's property is wrongly applied: It is judge Richardson's money, and he merely claims it back. No entry or credit was given on the execution; and nothing therefore prevents a *scire facias* for the amount not paid by the property of Wm. G. Richardson, as a man may buy a judgment and renew it. And that he paid plaintiff for the judgment is no satisfaction of the judgment, and not being satisfied what is to prevent the renewal of it by *fi. facias*? Plaintiff cannot be satisfied of her judgment, because J. Richardson may bring an action for money had and received for this money. This was not paid on the execution, but when paid, it was expressly stipulated that he should have the benefit of the execution to have his money refunded, and the agreement was to keep open the execution for that purpose.

Evans in reply.—All the assignments here made were after the claims of the judgment creditors vested. Bad policy to suffer judgments to be kept open. May lead to fraudulent transactions.

NOTT, J.—His application it is admitted, is one for the enforcement of the strict rigid rule of right. On the part of the respondent it is alleged, that the contract with judge Richardson of which he now claims the benefit was founded in the purest morality, not operating against the rights or interest of any person and intended as a relief to a brother in distress.

It is obviously the duty of the court to enforce such a contract, if there be nothing in the stern and inflexible rules of law which prevents it. And it does seem to me if there were any such rule, that it should be forever stricken from the law books.

The court is asked to order the attorney in this case to enter a satisfaction on the judgment. This implies of course, that if the satisfaction be not entered he can demand of the sheriff the money in his hands. Why should the court exercise their power over this officer in this manner? Has he violated his duty? Has he injured the applicants by his arrangement with judge Richardson? He has done neither. He has done nothing that the law or justice forbids. Why then should this court prevent him from carrying into effect this agreement? The answer must be, because it will benefit the junior creditors? Suppose this arrangement had not taken place with judge Richardson, would they have got the money now in dispute? Assuredly they would not. Their claim then is founded upon a supposed want of authority in the attorney to make such an arrangement. But on this subject they are certainly mistaken. An attorney can make such an arrangement. He may receive money from a friend of a defendant with an understanding made *bona fide* that it was intended to postpone the evil day, but that when it did arrive his money should be returned. Can he not give a receipt for the money, and thus discharge the debt of his client? (*Douglas* 623.) Having then the absolute control of the whole debt, why not pay money to a client to satisfy him, and afterwards on the receipt of his debt retain so much? Suppose Mr. Mayrant had sent his own money to his client, saying that at a more convenient season, the property of the debtor should be sold. Can it be doubted that he might retain when the property of the debtor was sold? And what difference does it make in the case, that he sent the money of another and not his own, when it was sent with that express understanding? Mr. Mayrant is bound to return judge Rich-

ardson his money. Mrs. Carson is equally bound in morality. She makes no objection. Now the other creditors say there was no assignment by Mrs. Carson. None was necessary. This it appears to me is the foundation of the mistake.

There is no necessity for an assignment. It is not judge Richardson who is to go to the Sheriff and receive this money. It is Mr. Mayrant and the Sheriff has no right to refuse to pay him the money. He knows that no more than the debt has been made out of the defendants property, and that Mr. Mayrant is the attorney, that was enough for him. Mr. Mayrant's receipt to him is a good discharge. Let the money be paid and these applicants sue, if they can maintain an action. I admit they ought to have their money. But I confess I am at a loss to conceive on what their claim could rest on this motion. Have they any lien on the money of judge Richardson in the hands of Mr Mayrant? None! Suppose judge Richardson's money was returned to him to-morrow. Who can prevent it? If it were done; then I suppose the right of Mr. Mayrant and Mrs. Carson to receive the one thousand one hundred dollars would not be disputed; and can there be any such legerdemain in the law as that a ceremony of that sort should sanctify an act?

The question in behalf of the applicants has been argued on the ground that the respondent was an agent, and, as such, his authority was limited. Now this would be very proper, if he were their agent, or if his acts were sanctioned by his principal. But neither being the case, of what importance is it to ascertain what were his powers as an agent? The question is as to them, had he a right to do the act; and the answer I think satisfactorily given—as to them he had all the authority of his principal.

The motion is dismissed.

Evans, for the motion.

W. Mayrant, contra.

THE STATE vs. GUY RAINES.

On an indictment for killing a slave "in sudden heat and passion" contrary to the act of assembly, the jury found a verdict of "guilty of manslaughter." Upon which the court held judgment could not be passed.

The crime, by act of assembly, of killing a slave *in sudden heat and passion*, is a different offence from the common law crime of *manslaughter*.

It is not enough to say, in an indictment, that a crime has been committed, in the words of the act; but it is also necessary to specify on the face of the indictment the criminal nature and degree of the offence, and also the particular facts and circumstances which render the defendant guilty of the offence.

The act of 1821, rendering it murder to kill a slave, does not take away from the prisoner, if he be master or overseer, in whose possession the slave was killed, the right of exculpating himself by his own oath. And the fact of a third person coming up at the moment of the death of the slave, after the wounds were given, will not alter the case.

The indictment in this case contained two counts, the first for murdering a slave. The 2nd. for killing a slave in sudden heat and passion, contrary to the act, &c. The following is a copy, viz:

STATE OF SOUTH CAROLINA, } *To-wit:*
Fairfield District.

At a court of sessions begun to be holden in and for the district of Fairfield, in the State of South Carolina, at Fairfield court house, in the district and State aforesaid, on the second Monday after the fourth Monday in March, in the year of our Lord, one thousand eight hundred and twenty-six.

The jurors of and for the district of Fairfield aforesaid, in the State of South Carolina aforesaid that is to say: James Owens, foreman &c.

upon their oaths and affirmation present, that Guy Raines, late of the district and State aforesaid, labourer, on the sixth day of March in the year of our Lord, one thousand eight hundred and twenty-six, with force and arms, at Fairfield court house in the district and State aforesaid, in and upon a certain negro man slave called Isaac, the property of William Gray, then and there being, then and there did make an as-

sault, and him the said negro man slave did wilfully, maliciously and deliberately murder, contrary to the act of the general assembly of this State in such case made and provided, and against the peace and dignity of the same State aforesaid.

And the jurors aforesaid, upon their oaths and affirmations aforesaid, do further present, that he the said Guy Raines, on the said sixth day of March in the year of our Lord one thousand eight hundred and twenty-six, with force and arms at Fairfield court house in the district and State aforesaid, in and upon a certain negro man slave called Isaac, the property of the said William Gray, then and there being, did make an assault, and him the said negro man slave, on sudden heat and passion, then and there did kill, contrary to the act of the general assembly of the said State in such case made and provided, against the peace and dignity of the same State aforesaid.

Pearson, Sol.

“ Guilty of manslaughter.”

J. G. Ellison, foreman.”

In challenging the jurors, the prisoner was not permitted by the court to consult his counsel.

On the trial of the case, the declarations of the prisoner were given in evidence; from which it appeared,

That the prisoner was taking the negro from Chester jail to Columbia, at the request of his owner, William Gray.

That the negro had broken open Hall's store, in Columbia, and stolen money, and had run away,

That he was a very bad negro, and had been a runaway, and had been shot, but not killed, and had the shot still in him;

That the negro turned sullen and refused to go further, and the prisoner whipped him to make him go along, and for no other purpose, and gave him, as the prisoner said, five hundred lashes.

That when the prisoner found he could not make the negro go along by whipping, he tied the negro's legs to pre-

vent him from going off until the prisoner could go and get assistance.

That the prisoner requested two women, at the first house down the road, to go back to the negro and prevent any one from cutting him loose, until he, the prisoner, should go on down the road to one Young's for further assistance.

That the prisoner had permitted the negro to ride his horse a part of the way.

The witnesses on the part of the state testified,

That the negro died about eight minutes after the two women reached him, and some time before the prisoner with two other men returned.

That the negro bled at the nose, mouth and ears, though there was no bruise or mark of a blow about the head or body.

That the negro appeared to have been severely whipped below the small of the back, and the blood appeared in several places, which seemed to have been touched by the ends of the switches.

That several small switches and two or three larger ones lay near, which appeared to have been much worn, also a stick with a small end and a larger end, seemed to have been used.

The witnesses on the part of the prisoner testified,

That the negro was a notorious runaway, thief, and house breaker; a sullen, perverse, desperate, dangerous villain; that he had been shot twice, had a load of buckshot in him, and had been shot at several times; that he was a strong, powerful fellow, and when runaway was dreaded by those acquainted with his strength and character; that he had been frequently tried and whipped for his villainy; that he had broke open Hall's store, in his dwelling house, in Columbia, at night, and stolen money and goods therefrom; that he had received from his master, William Gray, (an Englishman!) upwards of a thousand lashes on that account, six or seven weeks before his death; and had been sent off from Colum-

bia, to prevent his being hung; that he shortly afterwards run away and was caught and lodged in Chester jail. That the prisoner having business in Chester District, the owner of the negro requested the prisoner to bring the negro down to Columbia, and at the same time cautioned the prisoner to have the negro well ironed and to guard against his violence and villainy.

That the prisoner was a humane, peaceable man, and a man of good character.

The oath of the prisoner was then offered to exculpate himself under the act of 1740, which the court refused, on the grounds that other persons were present when the negro actually died, and that this privilege did not extend to cases under the act of 1821, under which the court considered the prisoner indicted.

The court charged the jury that the prisoner was not guilty of murder; but that he had given the negro undue correction and had killed the negro, and was guilty under the second count in the indictment. That a person having charge of a refractory slave has not a right to carry on moderate chastisement until the slave shall submit; that the prisoner had not the right to whip the negro moderately until he should consent to go along; that taking the negro under a charge of burglary, tho' guilty thereof, to justice was an immaterial circumstance, and did not excuse the prisoner.

The jury found the prisoner "guilty of manslaughter" but recommended him to mercy.

The prisoner moved the court in arrest of judgment upon the following grounds:

1. Because the finding of the jury was for a different offence from that set forth in either count of the indictment.

2. Because it does not appear from the indictment whether the prisoner was indicted under the act of 1740 or 1821, or whether sentence was to be passed under the former or latter act, and each count concludes against the act, &c.

3. Because manslaughter is a common law offence, and no act of the assembly declares the killing of a slave under any circumstances, manslaughter.

4. Because the indictment does not set forth the manner of the negro's death, nor the means by which it was effected.

5. Because the indictment does not set forth or allege any blow or mortal wound in any part of the body, by means of which the negro's death ensued

6. Because the indictment does not allege, that the act of the prisoner by which the negro's death ensued was done illegally or feloniously.

And a motion was made for a new trial on the following grounds:

1. Because the court erred in deciding that the prisoner should challenge jurors without the aid of his counsel.

2. Because the court erred in rejecting the oath on testimony of the prisoner.

4. Because the charge by the court to the jury was erroneous, except acquitting the prisoner of murder.

4. Because the finding of the jury was contrary to the evidence, and the law in relation thereto.

Job Johnston, for the motion as to the fourth, fifth, and sixth grounds in arrest of judgment, observed, that it did not appear by the indictment in what manner and by what means the deceased came to his death. This was necessary.

1. In order to identify the crime.

2. In order to enable the prisoner to plead an acquittal or previous conviction.

3. To enable the prisoner to prepare for his defence, and that he may know what may be proved against him. (1 *Starkie Cr. Plead.* 97.)

4. To enable the court, from a view of the record, to ascertain what crime had been committed.

5. To circumscribe the limits of proof, if the legislature has described the particular mode of committing the

crime. (1 *Russell on Cr.* 677. *East. Hawkins.*)

6. Because the indictment does not state the killing to have been by blows, or bruises, or that the wound was mortal. (1 *East Cr. L.* 42. 1 *Leach* 96. 1 *Hale* 186.)

7. The killing must be stated to have been felonious. (1 *East* 345.)

The same particularity is required in describing a statutory offence as in that of an offence at common law. (*Starkie C. L.* 235, 237. 1 *Whitty, Cr. L.* 275.)

Where a character is charged, as for being a common scold or a common barrator, no such particularity is required as where a particular act is charged.

This is a statutory offence not corresponding with the finding of the jury. (*State vs. Spergin*, 1 *N. Cord* 452.)

If the crime described in the act be technically manslaughter, all the particularity, above contended for, is necessary, if not, he relied on the case of *Spergin*.

The judge refused the prisoner the benefit of his oath because he was indicted under the act of 1821, and because in this particular case, the slave died in the presence of white people, although not wounded in the presence of white persons.

He contended the policy of the law was to prohibit private cruelty, and the owner or possessor of the slave is presumed to be the murderer; and to meet so unusual a provision of law, one so contrary to the common law, it was necessary to make a provision that the defendant may exculpate himself by his own oath.

The act of 1821, does not repeal that part of the act of 1740, which provides as to the evidence of the offence; for the act of 1740, has two general provisions.

1. As to the punishment of the crime, and

2. As to the evidence of the crime.

And the act of 1821, does not affect the act of 1740 as regards the evidence: though the prisoner be indicted under the act of 1821, yet such indictment can have no other object

than to lighten the punishment, as provided by the act of 1821. But the act of 1740 having provided rules of evidence for all cases, and these rules not having been changed or repealed by the act of 1821, of course then the rules of evidence must be the same, whether the indictment be under the act of 1740, or 1821.

Here it is said the act of 1740 does not apply because some white person was present. But was that the fact. The coming up of some person to the slave, who was dying alone, cannot be such a presence of white persons at the commission of the crime, as will take from the prisoner the right of exculpating himself upon his own oath.

Peareson, Sol. contra.—But one case, *State vs. Petty*, 1 *State Rep.* 69, which is at all in point. No words more proper for the description of a crime than the very words of the statute. The statute does not use the words *felonious*, but “wickedly &c. and in sudden heat and passion did kill.” In none of the precedents had he found the weapon or manner of killing stated: and precedents are often the best expounder of the laws. The act defined what it meant by manslaughter, and the verdict of manslaughter means such as is described by the statute. No particular words are necessary for the verdict of the jury, it is sufficient if it be certain and intelligible.

If the verdict be in wrong language, may not the same be corrected from the minutes of the judge? (1 *Chitty's Crim. Law.* 645-6.)

Thought but one ground questionable; as to the admission of the prisoners oath. The act of 1740 (2 *Brev.* 242,) provides punishments infinitely short of those of 1821, and the temptations of perjury are much greater; it is to save life under the act of 1821. And in passing that act the policy of the law was so entirely changed, that it cannot be considered that the legislature intended any thing short of an entire new modification of the law, and when the killing of a slave, maliciously, was made murder by the act of 1821, the

legislature can well be considered as providing this increased punishment upon the common rules of evidence at common law, of murder, and never intending to give the prisoner the right of swearing. For as the presumption was not to be taken against him, so he was not to be allowed a benefit only intended to meet such extraordinary presumption of guilt.

The rule is not true that all statutes should be construed *pari materia*. Cited a case on the insolvent debtors act.

Gregg, in reply.—In arrest of judgment, said he would make but a few desultory remarks. If this had been thought an indictment at common law, the fourth, fifth and sixth grounds, must be fatal. For he cited many cases to shew that it was necessary to set forth the manner and circumstances of killing, the wound, weapon, &c.

Then the question arises, does the indictment under the statute do away with those common law requisites? Though the indictment be in the words of the statute, yet, the words of the statute must be stated with these forms of the common law. It must be alleged feloniously. It does not appear upon what count the jury found their verdict.

For a new trial, he observed:

The act of 1821, is only to *increase* the punishment, evidently alluding to act of 1740. As to the negro dying in presence of some other person, he thought it could not vary the law. He thought the person was entitled to be sworn under the act of 1740, although the slave died in presence of white persons. What was he indicted for? For what he did. What was that? The allegation is that he beat the negro until he "suffered in life."

COLCOCK, J.—The grounds taken in behalf of the prisoner may be included in the following in the arrest of judgment:

1st. Because the indictment is defective inasmuch as it does not state the manner of the death, &c.

2nd. Because he has been found guilty of the offence of manslaughter, to which he is not subject by the laws of the state;

And for a new trial, because he was not permitted to exculpate himself by his own oath, as he had a right to do by the act of 1740.

By this act negroes were declared forever within this state to be chattels personal in the hands of their owners and possessors and their executors, administrators and assigns, to all intents, constructions and purposes whatsoever. But when this absolute dominion was given to the owners and possessors, it became necessary to place some restrictions upon the exercise of it. It was, therefore, enacted, that if any person or persons, whatsoever, shall wilfully murder his own slave or the slave of any other person, every such person shall, upon conviction thereof, forfeit and pay the sum of seven hundred pounds current money, and shall be rendered and is hereby declared altogether and for ever incapable of holding, exercising, enjoying or receiving the profits of any office, place or employment, civil or military, within this province, and in case he is not able to pay, shall be imprisoned, &c. And further, that if any person shall, on a sudden heat and passion or by undue correction, kill his own slave, or the slave of any other person, he shall forfeit the sum of three hundred and fifty pounds current money. And by the 39th section, it is declared, that if any slave shall suffer in life, limb or member or shall be maimed, beaten or abused, contrary to the directions and true intent and meaning of this act, when no white person shall be present, or being present shall neglect or refuse to give evidence or be examined upon oath concerning the same, in every such case, the owner or other person who shall have the care and government of such slave shall be deemed, taken, reputed and adjudged to be guilty of such offence, and shall be proceeded against accordingly, without further proof; unless such owner or other person as aforesaid can make the contrary appear by good and sufficient evidence, or shall by his own oath clear and exculpate himself; which oath every court where such offence shall be tried is hereby empowered to administer and to acquit the offender accordingly, if clear

proof of the offence be not made by two witnesses at least, any law usage or custom to the contrary notwithstanding.

By which enactments it is obvious, that it became necessary, and was the intention of the legislature, to make a radical alteration in the common law doctrine of homicide, so far as relate to owners or employers and their slaves. This act remained in full force, and was repeatedly acted on until the year 1821, when the legislature declared by their act, entitled, An act to increase the punishment inflicted on persons convicted of murdering any slave, and for other purposes therein mentioned, That if any person, from and after the passing of this act, shall wilfully, maliciously and deliberately murder any slave within this State, such person, on conviction shall suffer death without the benefit of clergy, and that if any person shall kill any slave in sudden heat and passion such person on conviction, shall be fined in a sum not exceeding five hundred dollars, and be imprisoned not exceeding six months. The professed object in this last act was to increase the punishment as to murder and to omit the killing by undue correction. Under the old act it is clear that the common law kind of homicide, technically called manslaughter, was intended to be abolished; for the citizen is only made amenable for three kinds of killing viz: murder, killing in sudden heat and passion, or by undue correction. Now although killing on a sudden heat and passion is manslaughter, yet manslaughter also embraces a killing by any unlawful blow or blows. But as it was lawful to give blows the owner shall not be adjudged guilty, except he give them in such number and to such extent as to amount to undue correction: and in such case it is clear that they meant not to apply the common law doctrine of manslaughter, because the punishment, of that offence is branding in the hand and imprisonment and they have imposed a fine only; and the practice has been in accordance with this view of the subject; for no man has ever been adjudged guilty of manslaughter for killing a negro. The purpose of the last act, it is presumed, in this par-

ticular, was the same as that of the legislature of 1740. If they had not intended that the offence of killing on sudden heat and passion should have been considered in a different light from that in which the common law views it, when occurring between men standing on equal footing in society, it would have been as easy for them to have used the technical word manslaughter, in the second section, as to have used the technical word murder in the first. No judgment then can be pronounced on this verdict.

That the indictment is also defective, I think is equally clear. There is an obvious difference between creating a new offence and altering the punishment of one known to the law. Now, supposing it to be sufficient to charge the new offence in the indictment in the words of the act, there can be no ground on which to say that the old offence must not be described as having been committed with all the particularity of the common law. The word murder is a technical word, the offence is well known to the common law. When the legislature use it, therefore, it is to receive its technical construction; as to that then the offence should have been charged in the indictment as at common law and all the essential parts of the common law indictment be pursued.

But, even as to the offence stated in the second count, the indictment is defective. Suppose it to be a new offence. It is as necessary in the case of a new offence as in the case of an old one, that a man should know what he is charged with and how he is to defend himself. It is evident that the law has been mistaken by the solicitor, in his supposing that it was enough to say an offence has been committed, in the words of the act. What is the object of the indictment? What are the reasons, on the ground of which the law exacts a certain particular description of the offence? From these it is evident that we can ascertain the true test by which the sufficiency of any criminal charge is to be ascertained.

It is necessary then to specify on the face of the indictment the criminal nature and degree of the offence, which are

conclusions of law from the facts, and also the particular facts and circumstances which render the defendant guilty of that offence.

1st. In order to identify the charge; least the grand jury should find a bill for one offence, and the defendant be put upon his trial in chief for another, without authority.

2nd. That the defendants conviction or acquittal may enure to his subsequent protection, should he be again questioned on the same grounds.

3rd. To warrant the court in granting or refusing any particular right or indulgence which the defendant claims as incident to the nature of the case.

4th. To enable the defendant to prepare for his defence in particular cases, and to plead in all, or, if he prefer it. to submit to the court by demurrer whether the facts alleged, supposing them to be true, so support the conclusion in law as to render it necessary for him to make any answer to the charge; and,

5th. Finally and chiefly to enable the court, looking at the record after conviction, to decide whether the facts charged are sufficient to support a conviction of a particular crime and to warrant their judgment; and also in some instances to guide them in the infliction of a proportionate measure of punishment upon the offender.

Now this certainty consists of two parts. The matter to be charged and the manner of charging it. Hence has originated the error as to the law. The matter is the crime, and this in a new offence by statute must be in the language of the statute and with all that is necessary to constitute the crime. (*Hawkins 73-77. Chitty 1.*)

But the manner is as necessary in the one case as in the other, and *Starkie*, in page 236, of his excellent treatise on criminal proceedings, says: It may therefore be assumed that there is no difference between common law and statutable offences as far as negroes. The general rules according to which the expanded description of the offence

should be expressed on the record, except indeed in those instances (and the exception confirms the observation) where the legislature has peremptorily directed that some general form of words shall be used. And this confirmed by *Chitty*, 1 vol. page 275, and by *Hawkins*, 2 vol. ch. 25. sect. 99 and 111. Although they all admit that it has been held otherwise by lord *Holt*, whose authority however on the subject cannot be put in the scale against the satisfactory reasoning on the subject by the authors I have referred to, and the repeated decisions made since his day.

From this view which has been taken of the subject it will be perceived that it is necessary that the indictment should conclude against the *statutes* in such case made and provided &c. for the first statute created the offence and the second has added to the punishment. (*Starkie* 256. *Hawk.* ch. 25. sect. 117.

I come now to the last ground, which is urged as a ground of new trial, and I am free to confess that it is by no means clear of difficulty. Two objections to the claim of the prisoner have presented themselves. One arising from the language of the act, and the other from the difference and degree of the punishment imposed by the last act. The first act of 1740, in which the clause is contained under which the prisoner claims the benefit of his oath, is in these words: "If any slave shall suffer in life, limb or member, or shall be maimed, beaten or abused contrary to the directions and *true intent and meaning of this act*." Now it is said the negro, in the case before us, was not beaten contrary to *that act* but contrary to the act of 1821, and the privilege of his own oath is only given to one who violates that act. The answer to this is, that the act of 1740 is a system of law adapted to the policy of the country in relation to slaves, and therefore any partial alterations are not to be considered as meant to repeal those provisions which arise out of this state of things.

The clause is general in its operation, and must of course remain. How can you limit its operation without le-

gislative provision. If it be said it may apply to the second charge in the indictment and not to the first, when a prisoner is indicted under both clauses of the act (as he must necessarily be) we cannot ascertain the degree of guilt until the evidence is heard. Therefore the evidence in defence must be heard to determine whether it is admissible.

But the more serious objection is that in a case where a man's life is at stake, the inducement to perjury is irresistible, and the privilege destroys the act; although this may be frequently the effect, yet we are not at liberty to say that the legislature meant to take away this privilege, for its necessity or propriety originated in a state of things not materially changed since 1740. The slave and his owner or possessor is perhaps as much secluded from the views of other white persons now as formerly; he is still even now for days and weeks, in many parts of the country, left entirely with the master or overseer, and if in this situation an accidental killing should happen, why not permit the person killing to prove how it happened? His being subjected to a more severe penalty for a murder is no reason why he should not be permitted to shew that he was free from all guilt; and this is what the law intends. If the accused goes further he abuses the law and adds to his offences; and this is in fact the law where one white man is killed by another out of the view of any person. If he confess that he caused the death and state the circumstances and manner of killing, the whole confession is taken, and if satisfactory, will induce an acquittal.

The particular ground of objection stated by the presiding judge cannot operate, because the mere presence of a person at the moment of the death does not enable such person to state how it occurred. See the *State vs. Taylor*, 18 *M Cord's Rep.* 483.

Johnston & Gregg, for the motion.
Peareson, Sol. contra.

*How lamentable
 this defect of
 the Law.*

*Why did they
 not let William
 Carter know
 of the murder
 of Parkman?*

JOHN WISE vs. CHRISTIAN FRESHLY & THOMAS L. VEAL.

A bailee for hire is liable for any injury the hired property sustains from his negligence, and the jury cannot at their arbitrary discretion assess the property at a value much less than its true value.

This was an action on the case tried before his honour Judge Waties, at Lexington, Spring term, 1826.

The evidence was substantially as follows: The defendant had by contract undertaken to open Saluda river, and remove the obstructions to the passage of boats. Being in want of hands they applied to the plaintiff, who hired at the rate of seventy five cents per day, two negroes, Edmond and Norridge, neither of whom could swim well, upon the express stipulation that they should not be employed in deep or swimming water. The defendant Freshley on the 28th October 1824, being about to finish the last part of the work which he then intended to do, proposed to put up a sign-post on a rock in a ripple, at the head of Lee's shoals above where Wise's hands had been before employed. He and all hands had been drinking too much. It appeared by going in below the ripple, that the water was eddy and the passage safe. Freshley suggested that the lower route was the safest, but at the instance of some of the hands he went above the ripple. When the canoe reached the sluice, on some danger being apprehended, Freshly jumped out of the canoe and ordered all hands to jump out, hold the canoe, and save his tools, of which there was about 200 lbs. weight in the canoe. The negro Edmond jumped out and was immediately drowned. It appeared also that Freshly was fully apprised of the danger of the place and subsequently stated to several of the witnesses, that he knew it was a very dangerous place, but that none of the rest of the hands knew the danger; that by his knowledge of the place he knew exactly where to jump out; and that if he had not he must have been in among the rest. That the rest of the hands who made their escape had to swim about three hundred yards; that Freshly would not permit a negro named Lamb, who belonged to himself and Veale to go in

the canoe; and that afterwards said if he had permitted Lamb to, go in he would have been drowned also. The sluice where the negro was drowned was proved to be a very deep and dangerous place—that to go in above the ripple was a very dangerous way, and that to go in below was perfectly safe and free from danger. That there was no necessity of Edmond's going in, Freshly having himself stated, that the other hands, all of whom were white men, were amply sufficient to put up the sign-post.

His honour, charged the jury, that the law was perfectly clear, and that the plaintiff was entitled to recover if they believed the contract to be proved, or upon the general liability of the defendant as bailee, if they believed the defendants had been guilty of any neglect; but left it to the jury to decide upon the testimony. The negro was proved to be worth one thousand dollars. The jury found for the plaintiff one cent. The plaintiff appealed and moved the court of appeals for a new trial, on the grounds:

1. That by the terms of the contract, which was most abundantly proved, the defendants were liable for the value of the negro;

2. That as bailee for hire they did not take that care of plaintiff's negro, which a prudent man would of his own and that they were therefore chargeable; and

3. That the verdict was contrary to the law and the evidence of the case.

COLCOCK, J.—In this case a new trial must be granted, for the jury have by their verdict established the right of the plaintiff to recover, and if he has a right to recover he ought to have the value of the property lost.

Where evidence is of a doubtful character, or where there is a conflict among the witnesses of the plaintiff and defendant, the juries are the proper persons to decide. But they have no such arbitrary and capricious power as to give to a citizen one cent for property indisputably proved to be worth five hundred or one thousand dollars.

O'Neal, for the motion.

Caldwell, contra.

WM. NIXON *ads* S. ENGLISH.

A note payable to bearer, and passed after it is due, does not carry along with it all the equities which may subsist between any intermediate bearer and the maker, it is only subject, in the hands of a *bona fide* holder, without notice, to the equities subsisting between the original parties.

This was an action of *assumpsit* on a note of hand. Defendant offered in discount a note of hand, given by Joshua English to James English, or bearer, and by him transferred by delivery to the defendant. To this discount the plaintiff offered to set off a note given by Joshua English to the plaintiff. This last note was dated in 1818, and was barred by the statute of limitations before the commencement of this action. The second was dated November 1820, and became due January 1821, and it was proved to have been passed into defendants hands, after it was past due. The jury under the instruction of his honour Judge Gaillard, who tried the cause, found a verdict allowing the (second discount against the first,) the whole account for the plaintiff. And the defendant appealed on the following grounds:

1st. That his honor the presiding judge charged the jury that they must allow the note of Joshua English to the plaintiff, to be set off against the note to James English or bearer, which had been transferred to the defendant.

2nd. On the ground that a *bona fide* holder of a note passed after due, is not bound to enquire, whether all the persons through whose hands the note had passed, without their endorsement, may not have been indebted to the drawer or indorser, at the time he received the note.

3rd. That where a note payable to bearer is passed after due, the bearer is not bound to enquire whether the antecedent bearers of the note may not have been indebted at the time they received the note to the original drawer, and cannot be effected by such indebtedness.

C. Levy.—A note passed after due is liable to all equities to which it was liable when in the hands of the

original holder. Here Mrs. English and her son understood each other. One note was held as a set off to the other. The note being made payable to order or bearer can make no difference.

I. G. Holmes. When Nixon received the note from Joshua English, what was Nixon bound to do? He was only bound to know whether any equities existed between the original drawer and the original payee. It cannot be requisite that the holder shall enquire of every other previous bearer, though it may have been through a hundred hands, if any equities or discounts existed between the drawer and any anterior bearer. In a commercial country, this, in some cases might be impossible. Suppose a private bank note, payable to bearer, and any previous bearer should have been indebted to the bank, could the bank, in answer to a demand of payment, set up a debt due by such bearer to the bank?

COLCOCK, J.—This was an action brought by Sarah English against William Nixon on a note, made by the defendant to the plaintiff, dated 20th June 1821, for fifteen hundred dollars. To this the defendant pleaded in discount a note given by the plaintiff to her son, James English or bearer, for six hundred and forty three dollars and eleven cents, dated 1st November, 1820. This note it is admitted was passed after due, by James English to his brother Joshua, and by him to the defendant, by delivery, there being no endorsement on the note. To this discount the plaintiff replied a note of Joshua English's in her hands given to her by the said Joshua for six hundred dollars, which she contended ought to be set off against her note, and that this had been agreed on between her and her sons James and Joshua. The evidence of James English shews that Joshua bought the note of their mother, from him, as he Joshua alleged, for the express purpose of paying, or discounting it with his mother, but that instead of doing so, he passed it to the defendant in this action. On the former hearing of this case, I well recollect that it was urged that this must have been known to the defendant. But as

the case now comes up it is admitted that he had no knowledge of the fact; and if so, it is clear, that the note of Joshua English in the hands of the plaintiff cannot be set off against her note in the defendant's hands.

The note of the plaintiff having been past after it was due, it passed of course subject to all the equities which subsisted between the original parties; that is, the plaintiff and her son James. And if the note, she now offers, had been James' note, instead of Joshua's, she would have had an undoubted right to plead it in discount. But it would be destructive of all commercial paper to say that a note payable to bearer should carry along with it all the equities which might subsist between the maker and any or every distinct holder of it. For this would necessarily impose on all who receive such notes, the necessity of going back to all who may have held it to ascertain if there were any dealings between them and the maker, which at a future time might be pleaded in discount.

I think it is clear that the unfortunate plaintiff has been imposed on by her son, but as the defendant had no share in the fraud, he cannot be made to sustain any of the consequences of it. She must look to her son Joshua on his note.

The motion is granted.

R. Bullard and Holmes for the motion.

C. Levy contra.

FRANCES LEE, Administrator of F. Lee, vs. GEORGE PERRY.

The following words were held sufficient to take a debt out of the statute of limitations, viz: "that the note had not been paid, and that he would not pay it, unless compelled by law, as it was out of date, and he had received no consideration for it."

If the existence of the debt be acknowledged, there is a legal promise to pay, and the debt is not barred by the statute.

Assumpsit on a note.

The note sued on in this case, became due on the 1st January, 1821, and the suit was commenced after the 1st of January, 1825. The note was given to Hood, and endorsed in blank, to plaintiff. The pleas were general issue and statute of limitations. To avoid the last plea, the evidence relied on was, that the note was presented for payment after the 1st January, 1825, when the defendant did not deny his hand writing to the note, but said "that the note had not been paid, and that he would not pay it, unless compelled by law, as it was out of date, and he had received no consideration for it." Upon this evidence, his honour who presided, instructed the jury that they must find for the plaintiff, and they did so. The defendant appealed.

Bullard, for the motion, cited *State Rep.* 484.

J. C. Carter. The note was transferred before it was due, therefore, the defence is inadmissible.

J. G. Holmes. The declaration here made, was tantamount to saying, "I have paid the note, and therefore will plead the statute." The statute has already been too much avoided; one decision has been made upon another, until the statute is forgotten, and every new case only turns upon some former decision. The statute has been literally abrogated.

Colcock, J.—It seems to be impossible to lay down any rule on this subject which will be intelligible. In *Burden & Elhenny*, 2 N. & M. 60. the opinion commences in these words "I think it is high time this question was at rest. I lay it down that a bare acknowledgement of a subsisting debt, is sufficient to take a case out of the statute of limitations;" and I

think the decisions of the court have been uniformly in support of this position. In the case referred to, the authorities are examined and commented on. And in the case of *Boyd vs. Carmichael*, it is said a "*clear and explicit acknowledgement of the debt, will take it from the operation of the statute.*" (2 N. & M' C. 62.)

Now what is the report of the present judge in this case? "A witness presented the note to the defendant, who said, that the note had not been paid, and that he would not pay it, unless compelled by law, as it was out of date, and he had received no consideration for it." Now it is impossible by any other words to convey more distinctly that this was a subsisting debt. This, to be sure, is not a promise to pay; but that is unnecessary, it is so distinctly stated in all the late cases. If the existence of the debt be acknowledged, there is a legal promise to pay, and the debt is not barred by the statute.

Bullard and Holmes for the motion.

Carter contra.

THOMAS K. MCCLINTOCK vs. JAMES GRAHAM.

The doctrine of fixtures is more rigorous in relation to claims between heirs and executors, than between those of landlord and tenant and the tenant for life and the remainder man or reversioner.

A Still, fixed in a rock furnace built against the wall of a house constructed for the purpose of distilling, is not a fixture, it seems, which passes with the land at sheriff sale, more especially as the previous owner of the freehold, himself, had made a severance.

This was an action of Trover to recover a Still and vessels. The plaintiff claimed under a levy made by himself, while acting as sheriff of Chester district, against John Russell. The execution on which the levy was made, had been previously levied on a tract of land, to-wit: on the 12th of July 1821. This levy not being disposed of, and the amount being under the summary process jurisdiction, on the 14th August 1821, he levied on the Still and vessels. The plain-

tiff proved the value of the property and closed, the demand and refusal being admitted.

The defendant moved for a nonsuit, on the ground, that the second levy was void, in as much as the first had not been disposed of.

The court refused the motion.

Defendant then produced the sheriff's title for a tract of land, sold by him as the property of John Trussell, and proved that the house in which this Still and vessels had been set up, was built for that express purpose, and that the Still had been set up in a rock furnace, which furnace was built against the wall of the house. Upon which defendant contended it became a fixture, and passed with the land at sheriff sale.

The court permitted parol evidence to shew that when the land was sold, nothing was said about the Still, except to one witness, who bought, the tract of land, on which the still-house stood. Defendant objected to this evidence, but was overruled. The plaintiff, under the charge of his honor, recovered. Defendant now moved for a nonsuit on the following grounds:

1. Because the Still, being put up in a rock furnace in a still house, which furnace was against the wall of the building, and this put up by the owner of the land, it was a fixture, and passed with the land which defendant had previously bought at sheriff sale.

2. Because, his honor charged the jury, that the appeal court had decided that plaintiff had a qualified interest in the Still and vessels.

3. Because the court charged the jury that the main question was, whether or not the purchasers at sheriff sale (Carter & McCalla,) considered that they were buying the still and vessels, when they bought the land; and if the Still and vessels were not sold to them, defendant could not retain them, as he bought of them.

4. Because, the court charged the jury that the levy, as made under all the circumstances of the case, vested the property in the plaintiff, and that the appeal court had gone a great way to decide the case.

Thomas Williams, for the nonsuit, argued, that the levy was void, and if so the plaintiff could not recover. To maintain such an action, the plaintiff must have an execution. He could not support the action from mere right of office. He had already levied on lands, and that levy was not disposed of: so that the levy on the personal property was void. A levy is *prima facie* evidence of satisfaction (*Miller vs. Bagwell*, ante. 429.) The recovery then must depend upon the gality of the second levy.

He claimed a new trial, because the house was built for the special purpose of a still-house; and the still was fixed to the wall in a stone furnace, and it was therefore a fixture. It was put up by the owner of the premises and not by a tenant, who, *prima facie*, intended leaving the place. Here the freeholder built for a particular purpose, and leaves the place, removing every thing but the still, which shewed he considered it a fixture. (6 *Bacon*, 174, *Tit. Sheriff. 1 State Reports* 415.)

Mills, contra.—The defendant comes as a trespasser, pretending no claim whatever. It was proved that the still had been advertised by itself, some time before the land was sold. The still was levied on before the sale of the land could have been made. It was before the sale day. Besides, the defendant owed more on executions in the sheriff's hands, than all his property could have paid. Admitting it was a fixture, the sheriff might sever, and having done so, his sale is good. (He cited 6 *Bacon*, *Sheriff*, 174.) He thought the English doctrine of fixtures not applicable to this country, and was abolished by the act abolishing the laws of primogeniture. (He cited 3 *East Rep.* 38. 3 *Bac. Tit. Exon. H.* 4, 6 *John. Rep.* 6. 7 *Mass. Rep.* 483. 17 *John. Rep.* 116.) The still-house was a mere shed. Where a thing of this sort is put up

for trade it is no fixture; otherwise when put up for the enjoyment of the freehold. (See 3 *Atk.* 12. The case of a cider-press.)

Besides, third persons cannot take advantage of the irregularity of the proceedings, as to the levy. (8 *John. Rep.* 361. 1 *Nott & N' Cord*, 408.

COLCOCK, J.—The first ground presents a question which is sometimes difficult of solution, and although not hitherto of frequent occurrence here, yet we may anticipate that we shall be called on more frequently to determine it, as we are daily resorting to the aid of mechanic power in our various pursuits. It is obvious that it must always be considered, first in relation to the article itself, to say if it be a fixture, and if so, then in relation to the parties claiming the right. The question arises:

1st. Between landlord and tenant.

2nd. Between tenant for life and the reversioner or remainder man, and

3rd. Between heir and executor.

Lord Mansfield says, as to the two first classes of persons, the rigor of the ancient law has been greatly relaxed; though with respect to the last, viz: heirs, executors, &c. he knows of no relaxation, except in a single case about a cider-mill, and that depending perhaps on the custom of the country (3 *Atk. Rep.* 14.) It is a general rule that an article which is fixed to the freehold, and becomes part of it, necessarily passes with it. Now in the case before us the first question is, was this a fixture? I cannot so consider it; because it is susceptible of being removed, without any injury whatever to the freehold or any part thereof; and even without disfiguring the premises, which it seems is sometimes made the criterion, and without digging up the soil, (3 *Bacon*, page 63, 64.)

It was a mere temporary thing, not indispensably necessary to the enjoyment of the land, nor actually fixed to any part of the freehold. In those cases in which the article or

building is indispensibly necessary to the enjoyment of the freehold, as between executor and heir, I should hold there was no doubt but that it must pass. But all difficulty in this case must vanish when we come to consider the question in relation to the parties claiming; as to them, it becomes a mere question of contract. McCalla the first purchaser from Trussell says, when he bought the land, the still was excepted, and Center, who sold to Graham says, he never heard a word about the still when he was buying, and did not consider himself as buying the still. Now whatever rights may be acquired by those who succeed, if, before they enter, the owner of the freehold himself makes a severance, there can be no room for doubt. The article in this case was reserved to Trussell, and consequently was subject to the levy made by the sheriff. And then the question arises, whether the levy made in this case did vest the property in the sheriff? It is admitted by the defendant's counsel, that a sheriff does acquire a qualified property in personal goods by virtue of a levy; but it is contended, that as a previous levy is indorsed on the execution produced in this case on a tract of land, and nothing is said on the execution as to that; that this affords proof that the subsequent levy was illegal and consequently could vest no right. The fallacy of such reasoning is easily detected; but before I proceed to shew it, it is necessary to advert to the situation of the parties. The defendant is sued as trespasser. There is no relation subsisting between him and the plaintiff in his official or individual character. He is a stranger to the plaintiff, and denies his right to the subject of the suit. The plaintiff produces an execution against Trussell the original owner of the land on which this still stood, which gave him authority to levy on the goods and chattels, &c. of the defendant. He levies on the land, and then on the still, and endorses the levies on the execution. Now it is well known that a sheriff may, and often does, levy on property which he finds incumbered, or claimed by third persons. It could not be said that in such case he is not permitted to levy

again on other property; or if he thinks the property first levied on, is insufficient, he may make a further levy. Such endorsement then is at least *prima facie* evidence of right in the sheriff; and if the land was sold by the sheriff, or the debt paid by the defendant, before the article in dispute was sold, the defendant must prove it; and he could prove it if it were so. Indeed, in the case before us, the objection loses all the force which it might have in ordinary cases; for here was Trussel himself the defendant in the execution, a witness who could easily have proved whether the land had been sold, and for how much. There was then no evidence produced to invalidate the levy made by the sheriff, and the legal effect of that levy was to vest the still in him and give him a right of action against any stranger who should deprive him of the possession of it.

Williams, for the motion.

Mills, contra.

DUNCAN LAWREN for JAMES DOVE, vs. NATHAN HANKS.

A plaintiff may, at any time before the verdict is read by the clerk, submit to a nonsuit, and a defendant who pleads a discount, may, under the same circumstances, discontinue or withdraw his discount.

The defendant offered in evidence, by way of discount to the plaintiff's demand, (which was admitted) two accounts amounting to one hundred and sixteen dollars, fourteen cents. After the jury had been charged, and had returned into court with their verdict, and before it was offered to the court, the defendant's counsel moved for leave to withdraw his discount from the jury, with a view to discontinue the same,—which motion the presiding judge refused.

The defendant's counsel now moved the court of appeals to reverse this decision, and for leave to enter the order and discontinue the discount to the plaintiff's demand.

Ervin for the motion. The defendant in putting in his discount, stands, as to the discount, as plaintiff in the action, and may withdraw it whenever he please. The plaintiff may take a nonsuit after the jury have returned, the verdict not being yet published, and the right to withdraw a discount must be the same.

Evans, contra. The discount is in nature of a plea. But the plea cannot be withdrawn after the jury have found their verdict, although not yet published.

COLCOCK, J.—There can be no doubt that a plaintiff may, at any time before the verdict is read by the clerk, submit to a nonsuit; and a defendant who pleads a discount is, as to that, considered as if he had brought his action. The object of the act was to prevent unnecessary litigation, and thus to enable a defendant who had a demand against one who should sue him, to recover it, without the necessity of a cross action. What reason then can be urged why a defendant in such a case should not as well be permitted to withdraw his action, as a plaintiff? It does not embarrass the plaintiff. If the discount is withdrawn, he goes on to recover his whole demand. In the case before us, the court should have granted the motion, and directed the jury to find for the plaintiff the full amount of his demand.—A new trial is therefore granted, unless the defendant be permitted to withdraw the discount, and endorse on the back of the record that it is so withdrawn.

Ervin for the motion,

Evans contra.

J. F. JENKINS vs. WM. MAYRANT, Sen.

No subsequent execution can issue, until the preceeding one be regularly returned. And where a *fi. fa.* and *ca. sa* are taken out together, both must be returned before another can issue.

To ascertain whether an execution has been issued in proper time or not, reference must be made to the actual time of *suing out the writ*, and not to its *test*.

This was a rule on Stephen D. Miller, Esq. to shew cause why an execution should not be set aside for irregularity, in having been issued after a year and day. Mr Miller returned the following facts: "The judgment was obtained in October, 1822, and signed 14th November, 1822. The second *fi. fa.* was issued, and dated, March, 1824, returnable to October, 1824, signed but not lodged. The third execution, was tested October, 1825, signed by the clerk, 17th February 1826, and lodged 18th February, 1826; and the question was, whether the *test* of the third *fi. fa.* or the date of signing the same should be regarded, so far as to authorize the renewal in question? The act of 1815, says, it shall, and may be lawful to issue execution on any judgment or decree of the court of law or equity, in this state, at any time within three years next, after signing or inrolment thereof, without any renewal of the same.

His honour, judge Gaillard, ordered the execution to be set aside, and from this order the plaintiff appealed.

Miller for the motion.—At common law the *test* is to be regarded as the commencement of the writ, and not the *signing* of the writ. (*Sellon* 526.) And the continuances are still regarded as of the original test. Cited to this point, *Sellon* 526 *Strange* 301. Where a person dies in vacation, a *fi. fa.* may still be taken out as of the preceeding (*Ib.* 515. *Ld. Raymond* 849,) term, the judgment being had then.

Wm Mayrant. Even if the test of the third execution be regarded as the beginning of the *fi. fa.* it was not within time. It must have commenced where the former left off. (*Gibbs vs. Mitchell*, 2 Bay 120.) In this case several days intervened.

The issuing of the writ must be the actual time of taking out execution, and not the test. It is the language of the act. Cited *Primrose* and *Becket*, *Ante*, 418, in which case the time of issuing must have been regarded and not the test.

Miller. That case stands clear of the common law principle upon which I have endeavoured to put this case. I contend, without the act of 1815, that by the principles of common law we are in time. It is a mere fiction of the common law that the execution is satisfied within the year and a day. The few days the gentleman talks of as having intervened, between the return and sitting of the court, do not *intervene*. The execution must be considered as running from court to court, and the days between return day and the court, when executions may be renewed, are legally considered as but one day, for the purpose of allowing the party to renew his execution and to receive what may have been collected on it.

Colcock, J.—This cannot be distinguished from the case of *Primrose, vs. Becket* and *Wilkins*, decided at our last sitting. The judgment was signed on the 14th Nov. 1822, and the last execution was lodged on the 18th Feb'y, 1826; which was more than three years, and consequently not within the provision of the act of 1815. But it is contended that the last execution was a continuation of the preceeding execution. This cannot be, for that was never returned, and no subsequent execution can issue until the preceeding one be regularly returned, except where a *fi. fa.* and *ca. sa.* are taken out together, and then both must be returned before another can issue. In the course of the argument, it seemed to be insinuated that the test was to be considered as the time of issuing the execution. But if it was so intended, it is certainly a mistake. There is an obvious difference between the test and the suing out of the writ as it is expressed. In *1 Sellon's Practice*, page 514, it is said, execution ought to be sued out within a year and a day after the judgment, ~~to be computed~~ from the time of signing the judgment;

the year to be reckoned by calender months, and not by the terms. (*Strange* 301.) And in page 520 of *Sellon* it is said, if a *capias satisfaciendum* or *feri facias* be issued out of term, let the test be the last day of the term; if issued in term, test the writ the first day of the term, although the judgment is not signed until four days after. And in page 515, it is observed that the execution need not be actually executed within the year and day; for if the *fi. fa. ca. sa.* or *elegit* be but sued out and returned within the year, continuances may be entered on the roll, from term to term, to the time of the execution, which may be at any time after the year, and as good as if judgment had been revived by *feri facias*. The writ in such case must be returned and filed, for the mere suing it out and continuing it on the roll, will not be sufficient. One sort of writ sued out and returned will support the awarding of a different kind of writ afterwards. Thus a *ca. sa.* may issue after the year upon a *fi. fa.* having been properly sued out, returned and continued. (2 *Bacon* 730, *Tit. Exon.*)

In this case it is not even certain that the second execution was a proper continuation of the first; for it is not stated when it issued, though it is presumable that it was. At all events, the third is not supported by the second. The execution is not, therefore, within the rules of the common law, nor the provisions of the statute, and was therefore properly set aside.

The motion is dismissed.

Miller for the motion,

William Mayrant, contra.

GEORGE MILLER assignee vs. WM. BAGWELL, and othe rs.

Where a bond was given to the sheriff for the prison bounds, stating the consideration to be the fact of the defendant's being in custody under a *ca. sa.* extrinsic evidence is inadmissible to shew that the defendant was confined in consequence of a surrender of bail after the judgment, but by inadvertence the bond was drawn for the prison bounds.

are evidence is inadmissible to prove a different, greater or other consideration than that stated in a bond, and which should have been inserted, when it is not stated in the bond, "and for other considerations."

For can a recital of an important fact be varied by parol evidence; but on the contrary it is always to be taken most strongly against him who makes it; and in this case the recital of the *ca. sa.* was considered the recital of the sheriff and not of the obligor.

It is not a safe or salutary rule to allow a contract to exist partly in writing and partly in parol.

This case came on for trial the second time, before Judge Huger, Spartanburg, Spring term, 1826.

This action was brought on a bond purporting to have been given to the sheriff of Spartanburg, under the prison Bounds act. The condition which was made part of the record by a plea of performances was in these words: "The condition, &c. is such, that if the above bound Muse Tollerson, who is in the custody of the aforesaid Thomas Pool, by virtue of a writ of *capias ad satisfaciendum*, at the suit of George Miller, shall remain within the rules, bounds and limits of the jail, &c. and also in forty days render to the clerk, &c. a schedule, on oath or affirmation, of his whole estate, or so much thereof as will satisfy the sum due on the aforesaid writ of *capias ad satisfaciendum*, by force of which he stands confined—then the above obligation to be of no effect, else to remain in full force and virtue." The bond was dated the 14th of January, 1823. Besides performance, the defendants pleaded several other special pleas in bar; two of which were heretofore sustained in the court of appeals. The second plea was *actio non*, &c. because the defendants say, that the said Muse Tollerson was not in custody of the said Thomas Pool, by virtue of a writ of *capias ad satisfaciendum*, at the suit of the said George Miller, as set forth in the condition of the bond, &c. To this plea the plaintiff replied specially, as follows: *actio non*, &c. because he says that although no *ca. sa.* had issued against the said Muse Tollerson, at the suit of the plaintiff, yet that the said Muse Tollerson had originally

been held to bail in the said action, having been arrested on a bail writ regularly issued, in March, 1822: that at fall term, 1822, a verdict was obtained in favor of the plaintiff, on which judgment was signed on the 25th, 1822, and execution issued the next day, against the said Muse Tollerson, the defendant: that on the 9th of January, 1823, after final judgment and execution as aforesaid, the said Muse Tollerson was surrendered to the sheriff by his bail, in discharge of themselves; by means whereof he became and was in custody of said sheriff, by virtue of the said surrender by his bail as aforesaid. In order to obtain for the said Muse, the benefit of the act establishing prison bounds, then and there freely and voluntarily made and executed the aforesaid writing obligatory, and the said Muse was thereby then and there admitted to the present rules in pursuance of the provision of the said act. But the condition of the said bond, the said Muse has in no wise complied with or performed. And the judgment and execution aforesaid of the plaintiff remain wholly unsatisfied, in no wise vacated or set aside &c. and prays judgment. To this replication the defendants demurred generally, and the plaintiff joined in demurrer.

The fourth special plea was *action non*, &c. because on the 10th day of January, 1823, the goods and chattels, lands and tenements and real estate of the said Muse was levied on by virtue of a writ of *fieri facias* in favor of the said George Miller and sold by the sheriff on the first Monday in February next ensuing, by virtue of the said levy and execution, at the instance of the said plaintiff. The replication to this plea was *precludi non*, &c. "Because after final judgment had been entered up and signed in favor of the plaintiff against the said Muse, and execution by *fi. fa.* had issued; to-wit on the 9th of January 1823, the said Muse was surrendered to the sheriff by his bail, in discharge of themselves, whereby he became and was in lawful custody by the said sheriff; that on the 14th January, 1823, the said Muse and other defendants well knowing the premises, and the said

Muse then and there being in custody of the sheriff as aforesaid by virtue of the said surrender, and in order to obtain for him the said Muse, the benefit of the act establishing prison rules, then and there freely and voluntarily made and executed the writing obligatory on which this action was brought; and the said Muse was thereby, then and there admitted to the prison rules, but the condition of the said bond, he hath in no wise complied with or performed. And that although the execution of the plaintiff was, with many others of an older date, levied on the property of the said Muse, yet the said levy was made before the said writing obligatory was executed; and although the said property was afterwards sold by the sheriff, yet the same was not sold at the instance of said George Miller, or for his benefit, and no part of the sum arising from the sale of the said property or of any other property of the said Muse, was applied to the payment of the plaintiff's judgment and execution, but was wholly applied to judgments of an older date, and the judgment and execution in favor of the plaintiff was at the time of sealing and delivering of the said writing obligatory, and still is, wholly unsatisfied, and in no wise vacated or set aside, and prays payment. To this replication the defendants demurred generally, and the plaintiff joined in demurrer.

His honour the presiding judge gave judgment in favor of the defendants on both demurrers, which the plaintiff now moved to set aside.

W. Thompson for the motion.—The bond would have been good, if taken without stating the authority or consideration. The authority can be the only question in dispute, not the recital of it. Cited 10 *Johs. Rep.* 456. *Holloway vs. Birthwhistle*, 2 *Nott and M'Cord* 350, to shew that a recital may or may not be made; and if made, it is not fatal. Should there be a mistake in the recital, it is surplusage. The question at the last court was, whether there was a *ca. sa.* in the case. Now we do shew the authority; which, though, by mistake, not that stated in the

bond, is the true authority, and a good one. Could see no difference between this case and that of *axwell vs. Harrison*, 2 *Nott & Mc Cord* 349. A recital is the rehearsal of some thing done before, and is not conclusive. (5 *Jacob L. D. Jenkin's Cent.*) A party should not loose by a clerical error of the sheriff. The consideration for this bond was to get rid of legal imprisonment, and it can make no difference whether under a *ca. sa.* or under a surrender of bail.

Irby contra —To allege a matter not contained in the plea is a departure. This question is decided by the former appeal. The sheriff in the bond state! a *ca. sa.* as his authority, now they pretend a surrender of bail. The authority would have been good, if correctly stated; but under the state of pleading no other authority could have been shewn.

W. R. Davis. The case of *Holloway vs. Birthwhistle*, is very different from the case of a bond. The sheriff may shew in a deed any authority. It is no part of the consideration. But in this case, it was the *consideration* of the bond which is stated in the bond; and if the wrong consideration be stated it is the misfortune or negligence of the sheriff. He cannot now be allowed to change his ground and shew a different consideration for the bond, that stated being wrong. The former opinion in this case is conclusive of the matter.

B. Earle, in reply.—The replication states that no *ca. sa.* issued, but goes on to state the true state of the case. He was in custody after final judgment; and the question is whether such a bond as this can be taken after final judgment and surrender of bail? Though he were in prison under mesne process, the bail having been taken under the writ, no *ca. sa.* being out, still the act was voluntary, with a full knowledge of all things. If the defendant voluntarily choses to state a *ca. sa.* knowing there was none, he should be estopped from saying the authority was not as he states in his own bond. The securities here sued are alleged to have known the whole circumstances, and

it was no departure in the replication to state the true facts, and that the defendant knew them. Besides, the declaration states the same facts, and there is no departure from the declaration; the condition is not mentioned. Defendant's praying oyer of the bond, did not make the condition of the bond part of the plaintiffs pleading.

Per Curiam. Craving oyer of the bond made the condition of the bond part of the pleading.

Earle in continuance.—Cited : *Phillips* 423—4.) The consideration of the bond was the lawful confinement and the discharge from it. It is competent to shew that he was in lawful custody by a different lawful process. The proof is not contradictory to the deed.

Colcock, J.—In this case the demurrer was properly sustained. Enough had been said in the opinion of the court at the last session, to shew that the plaintiff must recover on the bond as it was, or not at all. Without following the counsel through the devious course of pleading which has been pursued, and which was necessarily so, because an illegal object was sought, I ask what is the object for introducing parol evidence to prove that the consideration stated in the bond was not the true consideration, but that another and a better did exist, and ought to have been inserted? Now what is this but a violation of one of the best settled doctrines known to the law? The point has been determined in some ten or twenty cases, which are reported in the late reports, and has arisen so frequently, not from any doubt as to the doctrine. but from the carelessness and inattention of men to the manner of doing business: and where an error of the kind is committed there is always a struggle to recover.

In the case of *Shemmerhorn vs. Vanderheyden*, 1 *Johnson Reports* 140, where the same attempt was made, the court say, " the consideration is expressly stated in the deed of assignment itself, and the parties are thereby precluded from setting up any greater or different consideration. And the reference is there to *Black*. 1249, *Preston vs. Merceau*. To

allow of parol evidence for that purpose would be to extend or substantially to vary the language of a written contract. And so in *Humphord vs. McPherson*, 1 Johns. 418, the court say, "the contract between the parties was reduced to writing, and contained in the bill of sale, and recourse must be had to that instrument to ascertain its extent. It cannot be a safe or salutary rule to allow a contract to rest partly in writing and partly in parol." So in the case of *Hawes and Barker*, Mr. justice Thomson, says, "we must presume, after the execution of the deed, that the consideration mentioned in the deed was the one finally agreed on between the parties." *Spencer*, justice, concurred, and chief justice Kent, said, he had struggled hard and with a strong inclination to support the action, "but I cannot surmount the impediment of the deed, which contains a specific consideration." And, lastly, in the case of *Vraigley vs Hawes*, 7 Johnson's Rep. 342, which refers to several other cases, the court say, "It is a settled rule, that where the consideration is expressly stated in a deed and it is not also said for other considerations, you cannot enter into proof of any other, for that would be contrary to the deed." It was said, that this is a mere recital, and therefore parol evidence may be admitted to shew that it is incorrect. But giving to the argument all the force it can have, under any view of it, if a recital be of an important fact it cannot be varied, and is always taken most strongly against him who makes it. And here I should consider the recital as made by the obligee, and constituting an important part of the consideration. In the very authority referred to, 1 *Jacob's Law Dictionary*, 392, it is said, though a recital of itself may be considered as nothing, yet being joined and considered with the rest of the deed, it is material; and *Leonard* 112, is relied on. (1 *Dallas* 67. *Jacob Law Dict.* 5, vol. title *Recital of Deeds*.

Waddy Thompson & Earle, for the motion.
Irby & Davis, contra.

APPENDIX.

NOTE A.

ON the subject of *Nudum Pactum*, in connexion with the Statute of Frauds, the following questions arise:

1st. What consideration is sufficient to support an *assumpsit*?

2nd. What kind of written promise is held in law, to imply of itself a valid consideration, first as between the parties, next, as to third persons?

Including { Writings unsealed,
Mercantile paper
Writings sealed.

3rd. Of the application of *nudum pactum* to suretyship, and guaranty.

First then, what was sufficient consideration at *Common Law*, to support a contract, either for one's self or for another before the passing of the Statute of Frauds?

In *Andrews vs. Herne*, 1 *Levinz*, 33, "*assumpsit* in consideration of 20*s.* paid to defendant by plaintiff, to pay the plaintiff 20*l.* if Charles Stuart should be King of England within twelve months then next ensuing," (the king being in exile) was held good; "*because of the accident that he might die within six months.*" Matter of loyalty in this case seems to have been a sufficient consideration.

So, a promise to the bailiff on plaintiff's part, that if he would permit the prisoner, a woman, to tarry at the defendant's house for one night, for the case of the woman, he would deliver the woman the next morning or pay 20*l.* was held good.

and defendant paid 20l. (*Benson vs. Trench*, 1 *Levinz* 98. see also *Frenke vs. Clarke*, 2 *Do.* 17.)

So in *Keyme vs. Goulston*, (1 *Levinz* 140) "Put your daughter to school, and I will pay her board for her a year." Defendant had to pay 10l. Here inducing a person to contract a debt was a sufficient consideration.

So in *Rutter vs. Hebden* (1 *Levinz* 147,) "assumpsit in consideration that she would marry him, he would marry her." was held a sufficient consideration. Love or good morals here seems to be the consideration.

So in *Downs vs. Leck*, (1 *Levinz* 222) "in consideration that plaintiff would forbear to sue the defendant as administrator, till he, the defendant, had married such a woman, he would pay him." It was held a sufficient consideration; "he having forborn, and the defendant having married the woman." (See also *Russell vs. Huddock*, 1 *Levinz* 188.)

But the same judges in the next term, in *Clipsam vs. Morris*, (1 *Levinz* 248) held that "where A. indebted to the plaintiff, writes a note to the defendant to pay it to the plaintiff, who promises to do so in a fortnight, in consideration the plaintiff would forbear that long, the promise was void, tho' plaintiff tarried that long. (See also *Forth vs. Stanton*, 1 *Levinz* 262.) But see post *Oble and Dittlesfield*.

In *Bolton vs. Fenne*, (1 *Levinz* 257,) "assumpsit by a treasurer of the Navy" clerk, that if he would not trouble his master for the payment of tickets &c. (whereof the plaintiff was possessed,) that he would pay them," was held a good consideration, after verdict; "for the presumption was that the defendant was ordered by Sir George, (the Treasurer,) to pay them, and that the intent of this promise and forbearance was no other but that the plaintiff should go no more to Sir George for the money, and thereby discover that the defendant had not paid it, according to Sir George's order."

So in *Lee vs. Edwards*, (1 *Levinz* 280.) in consideration that he would provide medicines and would endeavour to

cure J. S. deft. promised to pay him as much as he deserved. Held good.

In *Davis vs. Reyner*, (1 *Levinz* 3,) the defendant being executor, and the plaintiff intending to sue him for a legacy, the defendant in consideration of *forbearance* promised to pay him,—held a sufficient consideration; though *nul assets*, *ultra* certain bonds, was pleaded. But if the declaration shewed there were no assets, plaintiff would have failed. (*Davis vs. Wright*, 1 *Ventris*, 191.)

In *Davison vs. Heslop*, (2 *Levinz* 20,) “Fenwiche was indebted to the plaintiff for arrears, and appointed defendant, then his receiver, to pay it out of the rents due at *Marblemas*. Plaintiff and defendant accounted, and thereupon, it appeared, 1171*l* was due. Defendant promised if plaintiff “would *forbear* he would pay it in a month after. For defendant ’twas moved in arrest of judgment, that it does not appear that the defendant received any rent at *Michaelmas*, and the appointment was to pay it only out of the rents due, at *Marblemas*; but to this it was answered, that it should be so intended now, the defendant having promised to pay it upon *forbearance*; and so held the Court, and gave judgment for the plaintiff:” and in S. C. in 1 *Ventris* 152, it was said that the taking of this promise did not discharge the principal debtor.

In *Oble vs. Dittlesfield*, (1 *Ventris*, 153.) J. S. was indebted to plaintiff, and the defendant was indebted to J. S. and J. S. appointed plaintiff to receive the debt of defendant, which defendant consented to, and promised to pay plaintiff if he would *forbear* a *fortnight*, the Court supported the action; defendant’s being discharged from J. S. being the consideration. (*Clipsam vs. Morris*, 1 *Ventris* 9.)

Defendant being the heir promised to pay a debt of his father, if plaintiff would *forbear* such a time; held good. (1 *Ventris* 159.)

In *Kent vs. Derby*, (1 *Ventris* 311,) “The plaintiff declared in *indebitatus assumpsit*, *pro diversis mercimoniis antea venditis et deliberatis ad requisitionem* of the defendant to

a stranger, did promise to pay. &c. It was contended in *arrest of judgment* that *indebitatus assumpsit*, would not lie, on a *collateral* promise to pay the debt of another." I presume on the ground, that the action should have been *special assumpsit*. But the action was supported. And in *Hawes vs. Smith*, (1 *Ventris* 268,) the doing an act, "*which was more than the plaintiff was bound to have done*," was held a good consideration for a promise to pay the debt of another. All the cases in the old books, which speak of *collateral* promises, only relate to the form of the action, for *debt* or *indebitatus* would not lie on them, being *special*. So, "if A. engages, that B. shall pay for certain goods that B. buys of C. this is good to charge him upon a *collateral* promise, but not upon an *indebitatus assumpsit*, for it doth not create a *debt*:" meaning a debt recoverable by action of *debt*. Thus, I am induced to believe, mistakes have been made as to the nature of *collateral* promises, and they have been supposed to have been held *void*, because they did not create a *debt*.

In 1 *Ventris* (*Anonymous case*,) 268, it was held that where a man promises in consideration that one (to whom the promise was made) would marry his kinswoman, he would give her £100. It was good.

Where an administratrix promised plaintiff to pay a debt (two days afterwards) due by the intestate, if he would submit the accounts to W. D. & O. to ascertain the true amount, the Court held it was a sufficient consideration; viz: the submitting the accounts and the 2 days forbearance, neither of which was he bound to do. (*Arch vs. Culpepper*, *Cro. Car.* 70.) See many cases in note (2) of *Metcalf, Ed. of Yelverton*, 11.

So in *Rolfe vs. Sharp*, *Cro. Car.* 77, defendant promised plaintiff if he would deliver to A. S. a gown and petticoat, which he had made for her, but she could not pay for them, that he, the defendant would, was held a good consideration.

So, a promise to pay the debt of another, upon consideration *past* is good, if it had been done at the defendant's

request. (*Townsend vs. Hunt*, Cro. Car. 408. *Rosden vs. Thinnes Yelverton*, 40. See all the cases in a note to *Miet-calf's Ed of Yelverton*, 41)

So where plaintiff had lent W. £20, at defendant's request, some time before, and had indulged W. the defendant promised to pay the 20*l.* to plaintiff, in consideration he would rest content and forbear *per paululum tempus*, the consideration was held sufficient. (*Cooks vs Douze*, Cro Car 241.) So *aliquo tempore*, (Cro Car 408 *Yelverton* 55)

So, if a stranger comes to an attorney and retains him for J. S. in an action between him and J. D. and promise to pay him, and he perform the services, the stranger is liable. (7 *Viner's Abr.* 331. *Tit. Debt.*) "So if one promises money to another for marrying of a poor vergin, debt lies." (*Haines vs. Finch*, 7 *Viner.* 332. *E.*)

"If I promise to J. S. 30*s.* to carry the corn of W. N. to D. and he does it, he shall have debt against me; and yet I have not *quid pro quo*." (7 *Vin.* 332 *Tit. Debt. E.*)

Where defendant requested plaintiff to sell J. S. some goods, and afterwards promised if J. S. did not pay, that he would, this was held no good consideration for an action of debt, but plaintiff could only have his action upon the case, upon the collateral promise; although it was said to be only a conditional promise. (2 *Vin.* 333-4. *Tit. Debt. F.*)

So it is laid down in *Doctor and Student, Dialogue II. chap. 24*, "that if he to whom the promise is made have a charge by reason of the promise. which he hath also performed, then in that case he shall have an action for that thing that was promised, though he that made the promise have no worldly profit by it. And if a man say to another, heal such a poor man of his disease, or make an highway, and I will give thee thus much; and if he do it, I think an action lieth at the common law."—"As if a man say to another, fast for me all the next Lent, and I will give thee 20*l.* and he performeth it, I think an action lieth at the Common Law."

So in *Lane vs. Mallory*, *Hob.* 4 5. it was held, that, "though the consideration be not at all beneficial to the defendant, who made the promise, if it be prejudicial to the plaintiff it is a good consideration; for that the plaintiff, "*in hope of his promise, did deliver them* (two statute staples) out and deprive himself of that means " I will endeavour to shew hereafter that the same reasons apply to all guaranty for goods to be got.

See the following cases. 37. *Hen* 6 9 *per Moile*. 17 *Edu* 4 5 "If I promise J. S. a certain sum for the commons of J. D. *debt* lies, for the law *implies* that J. S. is such an one, by whose service I have advantage." The same reason applies to every promise to pay the debt of another. So, "If A. buys of me certain cattle for ten marks, and undertakes in presence of B. to pay at a certain day, and B. at the same time undertakes to pay *if A. does not pay at the day*, *debt* will not lie, but it seems *covenant* would. (18 *E.* 3. 13.)

So if C. recovers £10 against A. and B. comes to C. and says, that if he will release A. that he will be his debtor, *debt* will not lie, but *covenant* will (9 *H* 5 14)

There certainly was a difference between *assumpsit* and *debt*, as to a *quid pro quo*. The promise to pay the debt of another was a sufficient consideration to support *assumpsit*, but not *debt*. Here then may be the cause of much error in the late opinions about *nudum pactum*. In 7 *Viner*. 332, *Debt*. *E. pl.* 18 "There is a diversity between *debt* and *assumpsit*, it is not necessary that the contract be *eodem instante*, but it suffices if there be inducement enough to the promise, and though it is precedent, it is not material; but in *debt* it is requisite that benefit come to the party, otherwise for want of *quid pro quo* *debt* lies not."

Although it is said in *Jenkins' Rerum Judicatarum*, {centuria septima, casus 17.) "*consideration est necessary a creator debt, auterment est nudum pactum*," (a consideration is necessary to create a *debt*, otherwise it is *nudum pactum*),

yet this must be considered as of actions of *debt* or of cases in the nature of a *gratuity*, or where the interest of the opposite side could in no way be changed by it. For if by the promise, the opposite side could shew he had been led to perform something, or to change his situation in life, as by marriage it seems not to be *nudum pactum*. However, on this subject see *Jenk.* 292. *pl.* 37. 301. *pl.* 71. 330. *pl.* 61. What I understand by the *nudum pactum* of the common law may well be explained by the last case cited. “*Indebitatus assumpsit* was brought by A. against B. because being in debt to A. in £15, he *assumed* to A. that if he would *forbear* suing him, B. until the first day of Easter Term he would pay him the £15.” It was held that the *assumpsit* would not lie, without shewing a consideration; for here the party should have sued on his original cause of action, if he had any, and not have sued on a promise to pay a debt simply, without stating what that debt was; such a promise of itself would not support an action. Which seems very properly adjudged. Here is another class of cases in the old books, which may have mislead the modern opinions of the profession in relation to consideration. (See the case of *Godwin vs. Bath, Sti.* 330.) So where £20 were promised the wife to procure a release from the husband, it was held a *nudum pactum*, the debt having been paid, and a release already obtained. (Cited in *Viner, Tit. Nudum Pactum.*) But the very next case cited by *Viner*, “A. is possessed of black-acre, to which B. has *no manner of right*, and A. desires B. to release him *all his right* in black-acre, and promises him, in consideration thereof, to pay him so much money; *sure this is a good consideration, and a good promise*; for it put A. to the trouble of making a release. (*per Holt, 12 Mod.* 459, *Thorp vs. Thorp.*”) So a *prejudice to the plaintiff* and a *benefit to a stranger*, was held a sufficient consideration. (1 *Viner* 307. *Action Assumpsit, (U.) pl.* 23.) Any thing is a good consideration after the case cited by *Viner*, 1 vol. *Assumpsit (U.) pl.* 59. So, here, “the defendant, in consideration of 5s. pro-

the old debt was discharged, at least the right of recovery which before existed was extinguished, and a new debt was created, and a new security substituted. The undertaking of the defendant was original and direct—that he himself would positively pay, absolutely and not conditionally, in consideration of the release of the negro and discharge of the distress; therefore it was denied that this case came within the scope, reason or policy of the Statute of Frauds: for it was argued that that the plaintiff's testator had a lien on the negro distrained, which lien he consented to discharge, in consideration of the defendant's undertaking; and the defendant's refusing now to comply with his agreement, is a manifest fraud, which the statute ought not to protect. It was further insisted for the plaintiffs that the promise in this case was not to pay out of a particular or specific fund, but to pay absolutely and generally; and that Col. Kershaw had agreed to take corn on the river bank to accommodate the defendant; which was a mere circumstance of accommodation relative to the mode of payment, but was not a condition of the contract.

Per Curiam, WATIES, J.—The evidence is very proper to go to the jury. Wherever a man is induced by another's promise to release a remedy, or forbear the exercise of a right which he has, the consideration is good to support the promise as an original agreement, and it cannot be deemed a collateral undertaking for another within the meaning of the statute against frauds and perjuries. Neither does it appear that the parties intended that payment in corn should be an essential part of the contract. It appears to have been casually mentioned and agreed on for the mere purpose of accommodation.

The defendant not having given any evidence material to his defence, the jury found for the plaintiffs.

Mathis and Falconer for the plaintiffs,

Brown for the defendant." (1 *Lrev. M. S. Rep.* 6.)

So, where a person taken on a *ca. sa.* is discharged out of custody on a promise by a third person, to pay the debt on condition of that discharge, the promise is valid, without being in writing. *Goodman vs. Chase*, 1 *Barn. & Ald.* 297. But it is doubtful if the reasons of this case exist in South Carolina, where a debt may be discharged under a *ca. sa.* without impairing its obligation. So, where one man, having a fund in his hands, which was adequate to the discharge of certain incumbrances, another party undertook, that if the fund was delivered up to him, he would take it with the incumbrance. This promise is valid though not in writing. (*Castling vs. Aubert*, 2 *East* 325.) So an agreement to purchase the debts of another, is valid though not in writing. *Anstey vs. Marden*, (1 *Bos. & Pul. N. R.* 124.) So where goods seised on execution are delivered up to a third person, on his promising verbally to pay for them, the contract is valid. *Skelton vs. Brewster*, 8 *John. Rep.* 376. So the debt on a sale of land to him by W. promised the plaintiff to pay him a debt which W. owed him, and this payment was to be in part payment of the land, it was held not necessary to be in writing. (*Gold vs. Phillips*, 10 *John. Rep.* 412. But see *Jackson vs. Rayner*, 12 *John. Rep.* 291.)

So, where the plaintiff promised not to require of the defendant the payment of a certain note, in consideration of which the defendant promised to indemnify the plaintiff from one third of all loss in consequence of his endorsement of certain notes for a third person, here was a new consideration between the parties, and the promise need not be in writing, (*Myers vs. Morse*, 15 *John. Rep.* 425.)

So, where a person indebted to the plaintiff deposited property in the hands of the defendant, for the purpose of enabling him to pay the debt, and it was agreed between the three, that the defendant should assume and pay the debt to the plaintiff, the promise need not be in writing. (*Olmstead vs. Greenly*, 18 *John. Rep.* 12.)

A promise by the defendant to indemnify the plaintiff if he would become special bail for a third person, whom the defendant was bound to save harmless in the suit, need not be his writing. (*Harrison vs. Sawtel*, 10 *John. Rep.* 242.)

A count, averring that J. A. made a bill of sale of goods to the plaintiff and that the plaintiff being about to sell his goods in satisfaction of his debt, the defendant undertook to pay him 122l. 19s. if he would *forbear to sell*, does not show that this is a promise to pay the debt of another, with sufficient distinctness to bring the case within the statute. (*Bannell vs. Trussell*, 4 *Taunt.* 117.)

So, "if my nephew should call for papers, I will be responsible for such as he shall take." The nephew when he afterwards called for the papers, said "that his uncle would be responsible for papers," Held that the credit was given solely to the uncle, and that the promise need not be in writing, (*Chase vs. Day*, 17 *John. Rep.* 114.)

In *Rid vs. Nash*, 1 *Wilson*, 305, the plaintiff brought an action of assault and battery against one Johnson, and when the cause was about to come on to trial, the defendant promised "that in consideration the plaintiff would withdraw his record, and not proceed to trial, he would pay him £50, and the costs of suit, and all sums which the plaintiff had paid and was liable to pay to his attorney and witnesses, which undertaking was held by the Court, (*Lee C. J.*) an original undertaking, not within the statute, as the defendant Johnson was never liable for the particular debt, damages or default, no verdict having been recovered against him :!!

E. brought an action against G. for monies due, whereupon H. promised E. that if he would forbear to sue G. for the said debt, G. should not leave the Kingdom without paying the plaintiff's debt. The Court thought the promise good, and that it need not be in writing. *Sed adjournatur.* cited 1 *Viner* 324. On this subject generally see *Wheaton's Selwyn*, and *Viner's Abridg. Tit. Consideration. Nudum Pactum. Assumpsit* :

II. What kind of written promise is held in law to imply of itself a valid consideration, first, as between the parties, next as to third persons?

As between the parties the cases are simple enough, and fall under the following divisions:

1. Writings unsealed.
2. Writings sealed.
3. Mercantile paper.

Writings *unsealed*, that, of themselves, import a valid consideration are such promises, or undertakings, either for one's self, or another, as state on their face that the undertaking is "*for value received*," or some such words, which are held, *prima facie*, to import a sufficient consideration, without any further statement of the consideration. (See *aldwell vs. McKain*, 2 *Nott and McCord*, 556)

All writings *sealed*, have uniformly been held to import a valid consideration, at common law, as far back, as any references can be made.

It may be well doubted whether the modern difference between sealed and unsealed instruments, is not a departure from the early common law, and whether the doctrine laid down in the case of *Rann vs. Hughes* (7 *Term Rep.* and *Brown Parliamentary cases*,) be in accordance either with the general principles of the English law, or the cases anterior to that period.

Sealing is stated by all authors who have investigated the subject to have been merely the substitute of an ignorant age for *signing*; and of course common sense would dictate, that the substitute could have no greater effect than the thing for which it was substituted.

The Anglo Saxons generally signed their names with *crosses*, and if, as is said by Lord Coke, they *sometimes* used seals, the argument would be stronger that they possessed no superior validity; as either the one or the other was used indifferently, for papers of similar effect. But although seals were certainly known among the Saxons, and perhaps used

in sealing their letters, as is done in modern days, yet their employment in legal transactions is at least doubtful, and the charters on which Coke relies for authority, have generally been supposed to be spurious.

We know that *William the Conqueror* expressly recognized the laws of England as he found them, and must have adopted the existing forms of instruments. We find, according to this supposition, that the Conqueror frequently confirmed his charters by his *sign or cross*, alone, which would demonstrate that even after the conquest that *signing or sealing* were regarded of equal effect, and that they were alternately used as one and the same act.

The word generally used in the latin legal papers of that age for seal was *sigillum*, and for signing *signum*, yet to show how little distinction existed between these two modes of signifying assent, *signum* was often used for sealing and *sigillum* for signing. Is it to be supposed that among the Normans the liberty of making contracts was confined entirely to the higher classes? A supposition which must follow necessarily, if it be asserted, that a seal was necessary to the execution of a contract; for until the reign of *Henry the II.* the privilege of using a seal scarcely extended to any but the greater Barons, as will appear from an anecdote of that period.—“Gilbert de Baillol, the chief lord of the fee of certain lands contested in the *Curia Regis* (*temp. Hen. II.*) exclaimed, during the discussion of the cause, that many chirographs in the names of his ancestors had been read in his hearing, but, that the deeds were not fortified by the testimony of their seals. Richard de Luci, the Justiciar, enquired if he had a seal. Baillol answered in the affirmative. The Justiciar replied with a smile of contempt, *moris non erat antiquitus quemlibet militum sigillum habere, quod Regibus præcipuis tantummodo competit personis.*”

For some time after the conquest, forms of authenticating a contract were very various, as may readily be supposed in an ignorant age; and it appears that they merely ~~used~~

such means as would well furnish conclusive evidence of the concurrence of the parties, should it ever come in question.— A man sometimes used the seal of another; sometimes both his own seal and the seal of another; sometimes his own seal and that of his town; sometimes one seal was used for two men; sometimes persons not parties to the contract sealed also; sometimes the witnesses sealed, and at other times neither signed nor sealed.

Even the mark of a tooth was often used as a seal, as in the famous grant of John of Gaunt, in the 15 century:

*" I John of Gaunt
Doe Gyve and graunt
To John of Burgoyne
And the heire of his loyne
Sutton and Putton
Untill the world's rotten.*

The attestation runs :—

*There being no seal within the roof,
In sooth, I seal it wyth my tooth."*

(Williams on Inventions, 1 vol. 190.)

If, then, *signing* and *sealing* were the same in their legal effect in their inception, a difference must be shown to have been created by statute or by a series of decisions evidencing the existence of a former statute, of which no record may exist.

It may be said that it is not denied, that signing is a sufficient way of executing a contract when a consideration is expressed. But where is this distinction to be found? If a sealed contract was valid without expression of consideration, undoubtedly a contract should be valid, where a method of executing it is used for which sealing is only a substitute.

Where did Lord Chief Baron *Skinner* find that a written contract was void, unless the consideration was expressed? In what statute, or in what decision; for he cites none?

It is truly astonishing, that *Wilmot* should have laid it down expressly, in the case of *Pillans & Rose, vs. Van Mierop & Hopkins*, that written contracts were valid, although no

consideration were expressed, that none of that learned bench dissented, and that no case was cited by the counsel, when Lord *Mansfield* asked the question whether a contract in writing had ever been held a *nudum pactum*.

The doctrine, that a contract written with deliberation is binding, is in accordance with the general belief of the community, with common sense and the analogy and symmetry of the law, as it would thereby place bills of exchange, notes of hands &c. on a footing with other written contracts, instead of regarding those instruments as an exception to the general rule.

Where is the reason or policy of saying that a paper by which I promise to pay a man one hundred dollars is good, while one by which I promise to give him ten ingots of gold is void?

This doctrine would avoid the multiplied disputes, as to the expression of consideration under the statute of frauds.

Lord *Coke* is constantly referred to as regards the antiquity and early effect of seals; but looking at the passages usually cited in his *Institutes and Reports* it would seem that he had not investigated the subject very deeply, and it may be doubted from his ignorance of the Anglo-Saxon language and antiquities, whether he was capable of eliciting light from their records. (See *Bish. Gibson's Letter in Seward's Anec.*)

The books consulted with regard to the above subject were, principally, *Spelmans Gloss. Arch. Du Cange. Gloss. Med. et. Inf. Lat. Maddox's Formulare Anglic. Rees Ency. Seals. Dictionnaire des Sciences, Tit Sceau. Quarterly Review LXVII. Jackstone Comm. Coke Rep. and Inst.*

In 2 *Plowden's Com.* 308, a simple writing and deed are spoken of indiscriminately, either was *factum*, whether signed with a † or sealed with a †.

It is a curious fact also, that after stating himself in these words, "And, Sir, by the law of this land, there are two ways of making contracts or agreements for lands or chattels. The one

is, by *words*, which is the inferior method; the other is, by *writing*, which is the superior. And because words are oftentimes spoken by men unadvisedly and without deliberation, the law has provided that a contract by *words* shall not bind without consideration." *Plowden*, cites many cases of *deeds*, and refers to the Year Books, 17. *Edw. 4* 4. b. 5. a. *per Townsend*. 11 *Hen. 4* 33. 3 *Hen. 6* 37. a. *per Rolf*. 45. *Edw. 3* 24. pl. 30. 14 *Edw. 4* 6. pl. 3. 17 *Edw. 4* 4. b. 15. *Edw. 4* 32. pl. 14. 19 *Edw. 4* 10. 20 *Edw. 4* 3. pl. 17. every one of which I have examined and not one of them mentions a deed, but 45. *Edw. 3* 24. pl. 30. and the question upon which nearly every one of them went off, was the jurisdiction of the court. And the case of 45. *Edw. 3* 24. pl. 30. does not shew that there was any distinction between *writings*. Indeed I believe, originally, every *written* contract was a *specialty*. Covenant and a contract under seal are certainly now synonymous. The above cases from the year books will clearly shew that *parol covenants* are continually spoken of. Where they were *parol* covenants no consideration was implied; but where they were *written*, and signed, marked or sealed, either by the witnesses or parties, a consideration was presumed, *as the act was done deliberately*. For the same reason, now that people write, they as deliberately sign their names, instead of signing their marks. To preserve the analogy in the present system, a consideration certainly should be presumed where a man only marks his †; for that was, generally, the seal of the common people; *Comyns* evidently understood *Plowden* as meaning to include all *writings*. For he says, that, "where an agreement or contract is in *writing*, the consideration is not enquirable; for it shall be intended to be executed upon good consideration" (*Comyns, Dig. Title Fait,*) and he refers to *Plowden*, as his authority, and *Plowden*, refers to cases afterwards, when he speaks of *deeds*, which cases were not upon specialties, but are cases on promises by mere *words*, which in the Year Books were held void for want of consideration. But the cases

do not say they would have been void if they had been in writing. Besides in all those cases, the courts were divided, and many cases are stated as valid, which in our days would be held *nudum pactum*, and most of the cases were decided on the ground of jurisdiction, being promises to marry, which were held of *spiritual cognizance*, only.

In the case of *Pillan vs. Van Hierop*, 3 Burr. 1663, the case came up expressly upon the question, whether, an undertaking in writing to pay another man's debt, was void or not, unless there was some consideration. Lord Mansfield, asked the question "if any case could be found where the undertaking holden to be a *nudum pactum* was in writing?" None could be produced. "I take it, said that great judge, that the ancient notion about the want of consideration was for the sake of evidence only; for when it is reduced into writing, as in covenants, specialties, bonds, &c there was no objection to the want of consideration. And the statute of frauds proceeded upon the same principle." It must be observed that throughout our law books, a covenant is said to be a specialty, yet the Year Books furnish a number of cases where the action of covenant was brought upon contracts in *parol* only, which were defeated, because, say the court, the contract being in *parol* only, was void for want of consideration. From whence it is to be concluded that the fact of their being in *parol* only, or *verbal*, as it is evidently used in these cases, rendered them void, as contradistinguished from written contracts, which, at that time could not be divided into written contracts *under seal* and written contracts *not under seal*; as the general way of signing was by sealing, which gradually became signing literally, as men began to write, through all the grades, of seals of beast, birds, crosses, initials, names, and at last hand writing, but which in truth meant nothing more than their signatures, or *signum*, which in *Madox's Formulæ* is often used for *sigillum* * This is appar-

* "At the bottom of this document was scrawled, in the first place, a rude sketch of a cock's head and comb, with a legend expres-

ent, for among commercial men, who must necessarily have been in the continued use of the art of writing, the want of consideration has never been held any objection to their written contracts: i. e. commercial paper. *Wilmot J.* said he could "find none of those cases that go upon a promise being *nudum pactum*, that are in *writing*: they are all upon *parol*."

Of *mercantile paper*, such as bills of exchange, &c. every one knows that they import a valid consideration, in whose hands soever they come (*See Bishop, vs. Young, 2 Bos. and Pul. 78.*)

What kind of written promise *as to third persons*, is held to imply of itself a valid consideration is a question of much more difficulty than any we have yet stated. Under this head comes the case of *Wain, vs. Warlters*, and all the subsequent cases *pro* and *con*, in England and in the United States. I intended at first to have reviewed these cases; but I soon found it would take a volume, and must now satisfy myself and the reader by a reference to the cases that support or acknowledge or doubt or contradict the case of *Wain, vs. Warlters*.

In *Wain, vs. Warlters*, (5 East, R 10,) the court of King's Bench held, that in a written promise or agreement to pay the debt of another, the *consideration* must be stated in the writing. That the words, *promise* and *agreement* in the statute meant different things. That the latter included the consideration, and therefore every promise to pay the debt of another should state the consideration. This case was decided in 1804. The statute was passed in 1667, *one hundred and thirty-seven years before*, and yet the question was never made till then, or the least suggestion made that there was a difference between *promise* and *agreement*; and no one using this hieroglyphic to be the sign-manuel of Wamba, son of Wileless. Under this respectable emblem stood a cross, stated to be the mark of Gurth, the son of Beowolf. Then was *written*, in rough bold characters, the words, *Le Noir Faincant*. And to conclude the whole, an arrow, neatly enough drawn, was described as the mark of the yeoman Locksley." IVANHOE

before that time ever objected to a promise to pay the debt of another, on the ground that the contract merely *promised*, without stating why. In 1805, the case of *Egerton, vs. Mathews*, (6 *East*. 307,) came before the same court, and though on the circuit it had been decided on the authority of *Wain, vs. Warlters*, yet when brought up to the King's Bench, it was discovered to be a case arising under the 17th section of the statute, and not under the 4th section. It was simply a contract for the sale of goods. In the 4th clause the word used is *bargain*, which the court held was different from *agreement*, and that it need not state the consideration. It appears to me it would have been much more sensible to say that in a contract for the sale or purchase of goods, stating the price, as was the case in *Mathews and Egerton*, was a statement of the consideration; and that all contracts of purchase, stating the article to be bought, and the price to be given, sufficiently state the consideration. However, the court preferred to make a distinction between the words *bargain* and *agreement*. I confess, I cannot see this distinction. It has been observed that Lawrence J. and Le Blanc J. both gave hesitating assents to the decision of *Wain* and *Warlters*. If there be a distinction between *agreement* and *bargain* then *Egerton, vs. Mathews* has no connexion with *Wain* and *Warlters*. Two years after *Wain* and *Warlters*, the Lord Chancellor, in *inet, ex parte*, expressly overrules *Wain* and *Warlters*. He says, "there are a number of authorities directly contradicting the case in the court of King's Bench, which is a most important case with reference to the consequences; for the undertaking of one man for the debt of another does not require a consideration *moving between them*." It will be observed that there is a consideration in all such cases. It interferes, no doubt, with the arrangements of the parties, which, it is presumable, are changed by such promises. It induces confidence on one side and credit, and the other side is the cause of it. "A consideration (says *Dyer*, 337, a) is a cause or meritorious occasion, requiring a mutual re-

competence in *fact* or in *law*. *Contracts* and *bargains* have a *quid pro quo*." If this be true, then *Egerton, vs. Athews* is wrong, for the word *bargain* would imply a consideration, as well as *agreement* or *contract*, which, it seems, are synonymous terms; or *Egerton vs. Athews* is right, and neither *bargain, agreement, or contract*, imply consideration, and then it follows that *Wain and Warlters* is wrong. In 1808, in the case of *Gardom, ex parte*, the Chancellor says something about the case of *Wain and Warlters*, but I confess I cannot understand what he would be at.

In 1807, in *Lyon and Lamb*, the court of *Exchequer*, admitted the doctrine in *Wain and Warlters*. (*Fell Mer. Guar.* 260) *Fell*, in the work just quoted, in 1820, attacked the cases of *Wain and Warlters*, and *Lyon and Lamb*, and shews thereby that the English bar has never been satisfied with those cases.

In 1821, the case of *Saunders, vs. Wakefield*, in the King's Bench, recognized to the fullest extent the case of *Wain and Warlters*, (4 *Barn. & Ald.* 595;) which was followed, a few months afterwards in the *Common Pleas*, by *Jenkins, vs. Reynolds*, to the full of *Wain and Warlters*.

In the *United States*, the doctrine of *Wain and Warlters* has never met with the approbation of the profession. In *South Carolina* the doctrine was acknowledged in *Stephens, vs. Winn*, 2 *Nott & Meord*, 372, in 1809; but since that, the cases in the present volume, p 58 162, have gone the other way, though the court has not finally made up its mind.

It is not the law of *Massachusetts*, *Lent, vs. Padelford*, 10 *Mass.* 230. *Packard, vs. Richardson*, 17 *Mass. Rep.* 122.

So in *New Jersey*, *Beekly vs. Beardsley*, 2 *South*, 570.

It is the law in *New York*, though against the opinion of Chancellor *Kent*, (*Leonard vs. Vredenburg*, 8 *John. R.* 29.)

In *Connecticut*, Judge *Swift* has made a most vigorous and able attack upon the case of *Wain, vs. Warlters*. (see *Day's* note to *Wain and Warlters*, in his Edition of *East*.)

III. Of the application of *nudum pactum* to suretyship and guaranty.

Admitting the truth of the doctrine of *Wainman v. Warblers*, it has been held, that a prospective guaranty implies a good consideration. It was always the law of England; "as where A. promised B. that in consideration he would sell goods to C. if C. did not pay for them, A. would himself" It was held a good consideration, (1 Roll Abr. 27. pl. 49. see also *King, vs. Wilson*, 2 Strange 873.)

A *prospective guaranty* must be distinguished however, from an original promise as it is called, which is not necessary to be in writing at all, as in all cases "where there is no liability in the party promised for;" for in all such cases it is considered as the debt of the promiser himself, and the question of consideration will stand as in all contracts between two persons, alone, without any connexion with a third person. In the *prospective guaranty*, credit is given to both; for if the party promised for does not pay, the creditor looks to the promiser. But in original contracts not necessary to be in writing, the party looks to the party promising, and to him alone. (See *Anderson vs. Hayman*, 1 Hen. Black, Rep. 120. *Keate vs. Temple*, 1 Bos. and Pul. 158.)

Suppose the promise be in writing, and the point is made whether it is an original promise or not. If the promise should be so nakedly expressed as not positively to shew that it was not a collateral promise, could not evidence be given, to shew to whom the credit was given, whether to both or one only, or as in *Keate vs. Temple*, "of the intention as inferible from the situation, circumstances and general responsibility of the party promising?" Nothing certainly could prevent it, unless the rule applies, that if a contract is reduced to writing, whatever is written merges all the evidence of other understandings than such as is written. But it seems that rule, could not apply, for besides the rule that where no consideration is expressed in a deed any may be shewn by evidence, (note to *Rob. on Frauds* 119,) the evidence to shew

to whom the credit was given, is of a distinct fact from the writing, as it must always occur after the writing. But in *Anderson vs. Hayman* and *Keate vs. Temple*, the validity, and of course, the consideration, of the contract depended upon that fact; wherefore conclude, that to determine such a case, whether a collateral or original promise, extrinsic evidence may be given to shew the consideration of such a written promise. Will not this reasoning apply to every promise? And does it not shew that the *consideration* does not form a necessary part of a contract, as even in deeds it may be proved *aliunde*? It is the inducement to the contract, but not a part of it.

This rule will apply in all cases of prospective guaranties; for the writing itself will either shew it to be a prospective guaranty, therefore, a sufficient consideration; or if upon its face it does not appear to be a collateral promise, evidence may be gone into to shew to whom the credit was given, or whether it is a collateral or original promise, and of course of the consideration of such promise, and in doing that it will appear whether it be a prospective guaranty or not. So it has been held in our courts that a *written warranty of title* does not preclude the *implied warranty of soundness*.

The statute speaks of "*debts, defaults or miscarriages of another*." *Defaults* and *miscarriages* both seem *prospective*; *default*, more especially; for if the *default* be already made then it is a *debt*. And it was always held a sufficient consideration at common law, if the promise was made before the debt was incurred; or if a request from the defendant preceded the act done, the promise of the party who so made the request for another, to compensate the plaintiff for such act done, is a good consideration. (*Dyer* 272. *Hunt vs. Patc.*) Therefore every prospective promise to answer for a *default* which another may make, shews a sufficient consideration.

So, "*any possibility of loss* occasioned to the plaintiff by the promise of another, is a sufficient consideration, although no actual benefit accrue to the party promising." (*Pillan*

vs. *Van Mierop*, 3 *Purr.* 1663. 1 *Saund.* 211. b.) I would define the rule, "any thing that changes the *situation, interest or condition* of the party to whom the promise is made, is a good consideration." (*Fell* 263.) So, any written promise under the statute to induce the opposite party to change his *situation, interest or condition*, shews a sufficient consideration.

In *Stadt vs. Lill*, 9 *East*, "I guarantie the payment of any goods, which I. Stadt delivers to J. Nichols," was held to shew a sufficient consideration. (*Redhead vs. Cator*, 1 *Far- kie's Rep.* 14. *Boehm vs. Campbell*, 8 *Taunt* 676) So the guaranty, "of the *present* account of Miss M. and *what she may contract*, from this date," was held good, in *Russell vs. Mosely*. 3 *Pro. and King* 211. See *Stead vs. Liddard*, 1 *Bingham's Rep.* 196)

What is the difference between a promise in consideration the plaintiff *forbear suing for a short time*, and a promise in consideration the plaintiff *credit* the stranger a short time? The former has always been held a sufficient consideration.

The reporter has made this hasty and desultory note on this important and unsettled part of our law, in hopes that it may lead a more able head to investigate the matter more thoroughly. He must conclude with the observations of a very sensible and moderate writer:

Miller in his *Inquiry into the state of the Civil Law of England*, p. 251, says, "A third part of the common law which might be submitted to re-examination, is that which pronounces agreements *without consideration*, otherwise termed *voluntary agreements*, to be invalid. By the law of all countries, certain requisites are necessary to make agreements binding; particularly those which are of a voluntary nature. By the Roman Law, a mere *nudum pactum* was inoperative; but whether this extended to written agreements or not, is uncertain * By the law of England, deeds that are *igned*,

* See Vinnius lib. 3 de obligationibus p. 596, et de pactis, cap. 5. On the Civil Law doctrine of nudum pactum, see Cod. 2. 3. 10. and 5. 14. 1, and Cooper's Justin, notes 581 to 587.)

sealed, and delivered, are deemed instruments of so high and formal a nature, that they are binding on those by whom they are executed, whether there has been any consideration or not. Agreements, though in writing, are not binding without sealing and delivery, unless entered into for a valuable consideration. "It is undoubtedly true (*Ld Ch. Baron Skynner*, remarked when delivering the opinion of the judges in the House of Lords,) that "every man is by the law of nature bound to fulfil his engagements. It is equally true, that the law of this country supplies no means, nor applies any remedy to compel the performance of an agreement made without sufficient consideration. Such agreement is *nudum pactum, ex quo non oritur actio*: and whatever may be the sense of this maxim in the civil law, it is in the last mentioned sense only it is to be understood in our law." In our Courts of equity the doctrine is the same as at common law. If a *voluntary deed* is regularly executed by signing, sealing and delivery, it is held good in Equity as well as at law without consideration. This is not the case with voluntary *agreements* even though in writing. Unless a valuable consideration has been given to the persons by whom agreements have been entered into, Courts of Equity will not interfere either to enforce or obstruct their execution. That some shape or form which implies a determinate act of the mind should be necessary to give validity to most kind of agreements, cannot be doubted; but there is no apparent reason why every agreement which is in writing, and signed by those who are parties to it, especially if in presence of witnesses, should not be executed by courts of equity whether it has been entered into gratuitously or not. *Grotius & Puffendorf* as well as *Ch. Baron Skynner* lay it down as a principle, that by the law of nature every man is bound to fulfil his engagements, and the only exceptions to its operation are cases of fraud or surprise, against which courts of equity invariably afford a

remedy.† If voluntary agreements were rendered in equity equally binding with others, it would save much trouble to which courts of equity are now put, in inquiring whether an agreement has been entered into for a valuable consideration or not; and would supersede a great deal of the inconclusive and inconsistent reasoning with respect to the *nature and amount of the consideration* upon which their opinions and determinations on this subject have proceeded. What harm would ensue, if voluntary agreements reduced to writing and signed by the parties, were good even in courts of law and against all the world? It would sometimes bear hard upon those who enter into gratuitous agreements to have them enforced against them; but the invalidity and revocation of gratuitous agreements is no less hard at present upon those in whose favour they have been executed, and who may have been induced by them to enter into obligations and relations which they would not otherwise have contracted. Indeed, it may be fairly questioned whether the distinction which now subsists in courts of common law between *deeds* and *agreements*, ought not to receive some modification. The sealing of deeds, which was of so much use when few people could write,* is now of no use at all: and as the seals are almost invariably appended by the law stationers by whom deeds are prepared, the use of them might well be superceded. With respect to the *delivery* of deeds it seems strange that the *delivery of them in the presence of witnesses* by the party should be requisite, while the *signature* of them by him is not necessary. The *signature* of them by him in the presence of witnesses, is an act of greater formality, and would rather increase than diminish the security against surprize if it were substitut-

† Grotius de Jur. Belli et Pacis, L. 2 cap. 11, De promissis. Puffend. L. 3. Ch. 5.

* It might have been added, that it is now much easier to imitate by forgery, a seal, than a hand writing. The law rendered necessary by feudal ignorance, ought not to be held binding when all the reason for it has ceased. In America the [L. s.] is generally printed on the blanks of deeds, bonds, &c.

ed in its stead. If the *sealing* and *delivery* of deeds could with safety be dispensed with and *signing in presence of witnesses* introduced as a substitute, two very desirable consequences would follow; the law itself would become more simple, and that simplicity would give rise to fewer actions in consequence of non-compliance with its directions." See Mr. *Fell's* observation, to the same purpose, in his *Work on Guaranties*, 292.

R.



INDEX.

ADMINISTRATOR.

See Executor and Administrator.

AFFIDAVIT.

See Bail.

ALIENS.

See Miſtha.

AMENDMENT.

1. Irregularities, such as are amendable by the court, consist either in omitting to do something that is necessary for the due and orderly conducting of a suit, or in doing it in an unreasonable time, or improper manner.—*Treasurers, vs. Bourdeaur,* 142
2. An execution can be amended after a sale has been made under it of lands, the usual words of authority to the sheriff having been omitted, *Ib.*
3. But the court will be more circumspect in amending after judgment than before, but the power is as ample in the one case as the other,

APPEAL.

See Practice. Prohibition.

1. The court of law will not hear appeals from the ordinary on matters involving the settlement of accounts.—*Wallis. vs. Gill,* 475
2. The object of appeals to that court is to require the aid of the court in those cases, where, according to the common mode of administering justice, the parties could have the benefit of that jurisdiction. *Ib.*
3. Where an appeal from the ordinary is of such a nature that it can be entertained by the court of law, new evidence may be offered, *Ib.*

ASSIGNMENT.

See Bond.

ASSUMPSIT.

1. Assumpsit will not lie for the breach of a contract under seal.—*Strobel, vs. Large,* 114
2. Plaintiff sold and conveyed to the defendant a tract of land, upon which the defendant entered and took possession: Upon an action of assumpsit for the purchase money, the court held, that the plaintiff might recover, although the contract was never reduced to writing: For, the contract was at an end, and there was nothing left but a promise to pay in consideration of the land thus actually transferred.—*Wood, vs. Gee,* 421
2. Or where upon a parcel contract for the sale of lands, the contract has been executed by one party, assumpsit may be maintained for the purchase money, *Ib.*

ATTACHMENT.

1. *Quere.* If when an attachment is levied on the property of one copartner or joint owner, the whole of the property may be taken into possession and sold, and the whole delivered to the purchaser?—*Chatsel & Co. vs. Bolton,* 33
2. But when the funds are reduced to money, the court will only order so much to be paid over as belongs to the partner sued, and may, at their discretion, order security to be given for that moiety, until settlement between the partners. *Ib.*
3. A defendant, who has been made a party in the court of common pleas, by a foreign attachment against his goods, and who resides in another state, can, under

- the act of Congress of 1789, transfer the proceedings to the circuit court of the United States for the district where such attachment issued.—*Martin, vs. Thompson*, 167
4. But, by the same act, the lien upon the property attached is maintained, to answer the final judgment, in the same manner as if the case had never been removed. *Ib.*
5. The act which authorizes constables to serve attachments, does not say, they shall not levy an attachment which issued for more than 20%. but that they shall not take more than 20% of property into their possession by virtue of any attachment. The limitation having reference to the property and not to the attachment.—*Kincaid, vs. Neal*. 201
6. A third person, though a judgment creditor, cannot set aside the lien of an attachment on account of irregularities in issuing and suing the attachment, the same having been waived by the defendant in attachment.
7. Where a magistrate issued an attachment, and a few days afterwards the defendant came in and confessed judgment, the court held that the lien of the attachment could not be postponed to subsequent judgments because no bond was to be found in the clerk's office, as it will be presumed the magistrate did his duty and that the bond was lost, unless the contrary be shewn by more positive evidences. *Ib.*
8. Books of accounts are not liable to *Domestic* attachments, so as to create a lien on the debts due the absconding debtor, as in foreign attachments.—*Ohora, vs. Hill*, 338
9. The garnishee cannot take advantage of any errors or irregularities in the proceedings against the absent debtor. No one but the debtor can take advantage of errors.—*Commerford, vs. Hall*, 345
10. A judgment is not void because it is erroneous, if it be rendered by a court of competent jurisdiction; until reversed by the defendant himself, it is only voidable. *Ib.*
11. So, if an attachment be taken out without the plaintiffs giving bond, only the defendant himself can make the objection. *Ib.*
12. In case of a foreign attachment, where the defendant comes in and enters into special bail to the action, as it is required by the act, the lien of the attachment is dissolved; and it becomes as any other case, where bail has been given: *Colcock, J* dissenting.—*Fife & Co. vs. Clarke*, 347
13. The giving bail, under the act, changes the proceeding *in rem*, into a proceeding *in personam*, *Ib.*
14. Attachment is a process *in personam* and not *in rem*.—*Crocker & Hitchborn, vs. Radcliffe*, cited, 251

AUCTIONEER.

See *Frauds*.

AWARD.

1. To an action on an award, the defendant should in his plea either deny the existence of the award, or he should plead performance or something by way of excuse for not performing it.—*Wooden, vs. Little*, 487
2. Under a submission of "all accounts, disputes, controversies and reckonings, of whatsoever nature, now existing between the same parties," it was held that the arbitrators might well embrace in their award, matters of a copartnership composed of the parties to the submission and a third person now dead. *Ib.*

BAIL.

1. The act of 1824, which exempts females from arrests under a *ca. sa.* does not exempt them from arrests under a bail writ.—*Desprang vs. Davis*, 16
2. The death of the principal, after the return and filing of the *non inventus* on the *ca. sa.* is no discharge of the sureties to a *test*

- bond—*Gordon v. Spring vs. Leipman*, 49
3. The time allowed the bail, after the return of *non inventus*, to surrender his principal is *ex gratia*, to avoid his liability, which is fixed from the return. *Ib.* 18
 4. When the sheriff assigns a bail bond to the plaintiff, under the statute, 4 Ann. c. 16, it must be done under his hand and seal, with two subscribing witnesses.—*Solemons vs. Evans*, 274
 5. The affidavit of an Administrator, to hold a defendant to bail, stated "that notes were found" among his intestates papers, "by which it appeared that defendant was indebted &c. \$1700." The court held that it was unnecessary to set out how many notes, or their dates, or to give any further description of them.—*Lowe vs. Mayson*, 313
 6. In case of a foreign attachment, where the defendant comes in and enters into special bail to the action, as is required by the act, the lien of the attachment is dissolved; and it becomes as any other case, where bail has been given: *Colcock, J. dissenting.—Fife vs. Clarke*, 347
 7. The giving bail, under the act, changes the proceeding *in rem*, into a proceeding *in personam*. *Ib.*
 8. Where a defendant was taken under a bail writ, and the sheriff, by mistake took a bond for the prison bounds, stating defendants imprisonment to have been under a *ca. sa.* the court held the bond void, and that the defendant was not estopped to shew that there was no *ca. sa.*—*Muller vs. Bagwell*, 429
- BAILMENT.**
1. A bailee for hire is liable for any injury the hired property sustains from his negligence, and the jury cannot at their arbitrary discretion assess the property at a value much less than its true value.—*Wise vs. Freshley*, 547
- BILLS OF EXCHANGE AND PROMISSORY NOTES.**
1. A receipt of a part of an order from the acceptor, after protest of acceptor and drawer both for non-payment, though without the knowledge or consent of the drawer, is not a discharge of the drawer for the balance unpaid.—*Motte vs. Kennedy*, 18
 2. Where the defendant drew an order on another person in favor of the plaintiff, the plaintiff must allege and prove that he presented the order, and that it was not accepted, or that it was accepted and not paid, and that the defendant had notice of the non-acceptance or non-payment. Merely stating that such third person, "although often requested to pay to the plaintiff, had hitherto wholly neglected and refused," is not a sufficient allegation.—*Treadway vs. Nicks*, 195
 3. So, where an order stated no consideration, the plaintiff cannot recover on a count stating it to have been given for, "*valus therein acknowledged*." *Ib.*
 4. Where the defendant indorsed a note which was *not negotiable*, obliging himself to pay it if the drawer proved insolvent, or "to make it good," all that can be required of the indorsee is that he should first use the ordinary means to get payment from the maker before he resorts to the indorser. The rules applicable to *negotiable* instruments does not apply.—*Wilson vs. Mullen*, 236
 5. The necessity of a personal demand upon the drawer, to render the indorser liable, is superceded in a variety of instances, which would impose on the holder an unreasonable degree of labour and inconvenience.—*Galpin vs. Hard*, 394
 6. So it seems, that if the holder cannot discover to which place the drawer has removed it is sufficient to excuse him from giving notice to the drawer: or where the drawer has absconded, or removed into a distant country. *Ib.*
 7. And where the drawer of a bill of exchange or maker of a promissory note has removed from the place where the bill or note represents him to reside, or where

- he did reside at the time the bill was drawn or note made, the holder is bound to use every reasonable endeavor to find out whither he has removed and, if he succeed, he must present it for payment, to charge the indorser.
8. The case of *Wilmore vs. Young*, said not to be law.
9. A demand upon the drawer, and notice of non-payment must be given to the indorser upon a note payable to bearer in the same manner as in case of notes payable to order.
10. A note being dated at a particular place does not render it payable at that place alone; and if enquiry be made for the drawer at such place, and he cannot be found, the holder is not thereby excused from enquiring elsewhere.
11. Between the original parties, evidence may always be given of the true consideration of a note: So it may be proved that it was given for the balance due on a settlement of accounts, and that a mistake was made in the amount.—*Hampton vs. Blakely*, 469
12. Parol evidence may be admitted to shew that a note which had been given in pursuance of an award had been given for too much, in consequence of a mistake in the arbitrators which they themselves had afterwards discovered.—*McCreary vs. Juggers*, 472
13. A note payable "to order" only, without mentioning the name of any payee, is considered as a note payable to a fictitious person, and may be sued upon by any *bona fide* bearer.—*Darega vs. Moore*, 432
14. Every renewal of a note is a discharge of the prior note; because the renewed note is a substitute for the former.—*Bank vs. Croft*, 522
15. Where a note, to which the defendant was indorser, had become due, in bank, but had by mistake been consolidated with a note of the drawer with other indorsers, by the attorney in bank of all the parties, who was authorized to *renew* their notes, and the note, which defendant had indorsed, was suffered to remain in bank a year, before the mistake was discovered, and then his agent renewed the note again, it was held that the defendant was not liable, as the subsequent renewal was irregular, and no notice of demand on the drawer and non-payment of the first note having been given to the defendant or his agent.
16. A note payable to bearer, and passed after it is due, does not carry along with it all the equities which may subsist between any intermediate bearer and the maker, it is only subject, in the hands of a *bona fide* holder, without notice, to the equities subsisting between the original parties.—*Nixon vs. English*, 549

BOND.

1. The sheriff may assign a bond given to him as sheriff, for property bought under an attachment sale; and the assignee may bring the action in his own name, as assignee.—*Hale vs. Shultz*, 218
2. Wherever a bond is drawn to one and he assigns, by the law of the contract it is assignable.
3. Though the indorsement was in blank and filled up, after suit was brought, it is good.
4. The plea of *non est factum*, to a bond, only puts the *factum* of the bond in issue, and the defendant under such a plea, cannot object that the bond was illegally assigned to the plaintiff.—*Solomon vs. Evans*, 274
5. When the sheriff assigns a bail bond to the plaintiff, under the statute, 4 Anne, c. 16, it must be done under his hand and seal, with two subscribing witness.
6. A date is not indispensably requisite to a bond, as it takes effect from delivery, as in case of all deeds, and it is admissible, by parol, to prove that it was delivered on a different day from that on which it is dated.
7. A shorter period than twenty years in this state, with additional circumstances, will induce the

presumption of the payment of a bond.—*Blake vs. Quash*,

340

8. Having settled an account in the mean time, without any notice taken of a bond, is such additional circumstance, as will induce the presumption of payment in less time than twenty years.

9. There are cases, in this state, which would warrant a jury in being satisfied with circumstances, to raise the presumption of payment, less strong, than may be required in England.

10. The acknowledgements, and even part payment, by an heir at law, on a bond, will not suspend the presumption of payment in a suit against the executor.

11. Under the particular circumstances, the court held the jury might well find for the defendant, after a lapse of fourteen years non-payment on a bond.

12. It seems there is a distinction between length of time as a bar, and where it is only evidence of it, in the latter case less time may raise the presumption.

13. An alien enemy, who leaves the country and carries off his bond, is not entitled to interest on it during the continuance of the war.

14. On a bond conditioned to pay several sums by different instalments "without interest, but with interest if not punctually paid," the money not having been punctually paid, it was held, that interest was recoverable from the date of the bond, and not from the time the instalments respectively became due; and the penalty became forfeited by the non-payment of the first instalment.—*Wakefield vs. Beckley*,

480

C.A. SA.

See Execution.

CHARLESTON & CITY COURTS.

See Jurisdiction.

1. A bond held by an inhabitant of the city of Charleston is subject

to taxation, though the obligor resides out of Charleston.—*Hayne vs. De Lesseline*,

874

CHURCH.

See Limitations, Statute of,

CITIZEN.

1. A native of France, who came into this country as early as 1774, and resided here ever since, exercising all the rights of citizenship, is a citizen by virtue of the Declaration of Independence, and may take and hold lands, by inheritance or purchase.—*Chanit vs. Villeponteaur*,

29

COMMISSIONERS OF THE ROADS.

1. The act of 1817, taking away from the Commissioners of the roads the power to grant or open any new road over the lands of persons who shall signify to the board any opposition, &c. was held by the court to extend to "private paths," mentioned in the act of 1788, and to all description of ways.—*Capers vs. Wilson*,

170

2. It was also held that the Commissioners had not the power to shut up a new way which they had opened, and to open, again an old road which they had closed. The Commissioners are not the judges to determine the necessity which gives a way.

Ib.

COMMON LAW.

See some of its absurdities, in note p. 98.
Method of divorcing a wife,

99.

CONFIRMATION.

See Ratahabitis

CONSIDERATION.

See Frauds, Evidence. Pleadings, Appendix A. Bills of Exchange.

CONSTITUTION.

See Slaves.

1. The law allowing a landlord to distrain for double rent, where the tenant holds over after notice to quit, is not unconstitutional; for by the continuance of the tenant he makes it his contract.—*Tuleando vs. Cripps*,

147

2. The act of 1794, requiring aliens to do militia and armed duty is neither against the constitution of the United States, nor against the Laws of Nations.—*Anley vs. Timmons*, 329

3. The constitution of the United States has not given to Congress the absolute and exclusive control over the militia of the States. 1b

4. It seems, the power given to Congress, by the 8th section of the first article of the constitution, is of a limited nature and confined to the objects specified in the clauses, and in all other respects and for all other purposes, the militia are subject to the control and government of their respective states. 1b

CONTRACT.

See *Infant*.

1. A contract for the purchase of goods by two, may be for their equal and not for their joint benefit.—*Connally ads Hull*, 6
2. If a contract be made by an infant and an adult, they cannot both be sued thereon, but the action should be brought against the adult only. 1b

CONVEYANCE.

1. A deed of land is not affected in any way, by not being recorded, except as to subsequent purchasers from the same vendor, or as to subsequent creditors.—*Martin vs. Quallebam*, 205

COPARTNERSHIP

1. A contract for the purchase of goods by two, may be for their equal, and not for their joint benefit.—*Connally ads Hull*, 6
2. Quere, if when an attachment is levied on the property of one copartner, or joint owner, the whole of the property may be taken into possession and sold, and the whole delivered to the purchaser?—*Chatsel vs. Bolton*, 33
3. But when the funds are reduced to money the court will only order so much to be paid over as belongs to the partner sued, and may at its discretion order secu-

rity to be given for that moiety, until settlement between the partners. 15

CORONER.

1. The city coroner and not the district coroner, is the proper officer to serve a writ upon the city sheriff of Charleston.—*Miller & Co. Yeaton*, 11

CORPORATION.

1. The Bank of the State of South Carolina, though owned entirely by the State, is a mere corporation, possessing the same power and privileges of other corporations.—*Bank vs. Gibbs*, 315

COST.

See *Tender*.

1. Less than twenty pounds old currency will not carry cost, except in particular actions enumerated in the act of 1799, (see these exceptions, note, (a).)—*Elms & Co. vs. Beers & Bunnell*, 3
2. When a judgment is rendered against a defendant he is liable to pay the costs and from him the clerk should collect them. If he be insolvent and unable to pay them, then the clerk may have recourse to the plaintiff, and may maintain his action against him for services performed.—*Corrie vs. Fits*, 25
3. In this state, costs abide the determination of the case, and the clerk may collect his own. 15
4. It seems the plaintiffs have no power to receive or collect the costs of the officers of court. 15
5. Under the act of 1733, allowing magistrates double costs, in any action, suit, bill, plaint or information commenced or prosecuted against them, they may recover double costs in *qui tam* actions brought against them.—*Barkdale vs. Morrison*, 16
6. If the plaintiff sue in the general jurisdiction of the circuit court, for a sum above the summary process, and it appear that the debt sued for has been reduced by direct payments within the summary jurisdiction, he can re-

cover but *sum. pro. costs*; but if it be so reduced by discounting on the trial an *independent demand*, full costs are allowed.—

Smith vs. M. Masters,

288

7. And where the plaintiff sued for a sum above the *sum. pro.* jurisdiction, and it was reduced to 75 cents by the discount of an independent demand, yet the court allowed full costs.

Ib.

8. Where a sheriff advertises property in a district where a gazette is printed, he is entitled to receive the costs of printing such advertisement, and nothing more.—*State vs. Becket,*

290

9. When property is for sale by sheriffs in districts where gazettes are printed the advertisement must be published in one or more of them; and where there are no gazettes printed, notices must be put up at the court house door, and at two other public places in the district.

Ib.

10. And it is not necessary, in districts where gazettes are published, to give any other notice, than in a gazette

Ib.

11. But where a gazette is not published within the district, but there is one within forty miles of the court house, advertisements must be published in such gazette as well as at the places in the district.

Ib.

12. In all cases where the law requires the publication in the gazette, the sheriff is entitled to such costs; and where it requires, also, three other advertisements in the district, the sheriff is entitled to the fees for such manuscript advertisements.

Ib.

13. For advertisements not published in a gazette, the sheriff is entitled to \$1, for the first time, and 50 cents for each succeeding advertisement in the same case.

Ib.

14. Where there are a number of plaintiffs against the same defendant, and his property is advertised under all their executions, the sheriff, is still only entitled to the costs of one advertisement; as all the plaintiffs names can be put into the same advertisement.

Ib.

COTTON.

1. Under the act of 1822, rendering it indictable for "knowingly and wilfully packing or putting into any bage, bale or bales of cotton, any stone, wood, trash-cotton, cotton seed, or *any matter or thing whatsoever &c.*" a person may be convicted for fraudulently packing, putting and pouring a large and undue quantity of water into bales of cotton with intent to cheat and defraud &c.—*State vs. Holman,*

206

2. The expression "*any matter or thing,*" is not restricted to the things, "stone, wood, &c." specified in the preceding part of the clause.

Ib.

3. The rule, that general terms in a criminal statute are restricted to the particular offences enumerated, does not apply, except in those cases where there is some repugnance or incompatibility between the specific and general expressions.

Ib.

4. As under the act against trading with a slave, the *selling goods to a slave for cash*, was held indictable under the general words of the act "*or shall otherwise deal, trade or traffic.*"

Ib.

COVENANT.

1. In an action of *covenant* on an agreement under seal the plaintiff may recover damages to the extent sustained without regard to the *penalty*; but in *debt* only to the amount of the penalty. The recovery in either case will be a bar to the other.—*Strobel vs. Large.*

114

2. Defendant leased to plaintiffs, Nelson's Ferry, and two hundred acres of land, and covenanted with plaintiffs to furnish one half of the laborers necessary to erect a bridge over a neighboring creek, and to *assist* in opening a new road to the Ferry. From the nature of the covenant, it was held that the plaintiffs were the actors, and that the defendant was not bound to move in the matter, until he had notice that the plaintiffs were ready to

engage in it, nor was he bound to contribute to the expenses until they were incurred, the benefit being more immediate to the plaintiffs.—*Davis & Lehre vs. Gourdin.*

2. To an action on a contract containing mutual covenants, the defendant to take advantage of any breaches on the part of the plaintiff, by way of discount, must specify the breaches particularly in his notice of discount.—*Maverick vs. Gibbs.*

COURTS.

1. If a circuit judge, whose duty it may be to hold any particular court, should be absent from indisposition, &c. any other circuit judge is authorized to supply his place. The judges of the appeal court are only required to do so, in case of the absence of any circuit judge or chancellor.—*Fleming vs. Lyon.*

CUSTOM.

See Usage.

DAMAGES.

See Debt.

1. In an action of *covenant* on an agreement under seal, the plaintiff may recover damages to the extent sustained without regard to the *penalty*; but in *debt* only to the amount of the penalty. The recovery in either case will be a bar to the other.—*Strobel vs. Large.*
2. *Same case.*
3. The general rule is, that whatever damages the plaintiff may have sustained, in an action of *debt*, he can only recover mere nominal damages, beyond the penalty.—*Ib.*
4. On the plea of *non est factum* to a bond conditioned to perform covenants, the plaintiff must have a verdict, if the bond be proved; and on a reference to the jury to assess the damages, they cannot find for the defendant.—*Perry, vs. Clymore.*
5. Where a rule, at law, is established for assessing damages, the

jury are not at liberty to adopt or reject the rule, at their pleasure.—*Ryan, vs. Baldrick.*

6. A bailee for hire is liable for any injury the hired property sustains from his negligence, and the jury cannot, at their arbitrary discretion, assess the property at a value much less than its true value.—*Wise, v. Freshly.*

DEBT.

1. In debt damages can only be recovered to the amount of the penalty.—*Strobel, vs. Large.*
2. Covenant to erect a steam engine. Penalty \$1,000. In an action of *debt*, on the covenant, damages can not be recovered beyond the penalty. And a verdict for the penalty, with interest from the date, set aside, *nil interest* be remitted.—*Ib.*
3. The general rule is, that whatever damages the plaintiff may have sustained, in an action of *debt*, he can only recover mere nominal damages beyond the penalty.—*Ib.*

DEBTS, ORDER OF PAYMENT.

1. A debt due to the Bank of the State of South Carolina, is not a debt due to the *public*, and can claim no priority on that ground.—*Bank vs. Gibbs.*
2. The Bank though owned entirely by the State, is a mere corporation, possessing the same power and privileges of other corporations.

DEED.

See Evidence. Bond.

1. What is sufficient evidence to prove a deed where one subscribing witness made his mark and did not remember it, and the other witness not recollecting the fact either.—*Martin, vs. Quattlebam.*
2. By the law of England, a copy of a deed, duly enrolled, is as good evidence as the original itself; and was the law of this state till the case of *Purds vs. Robinson*, a decision much to be

- regretted, decided that the loss of the original must be proved, to admit a copy.—*Peay, vs. Pickett*, 318
3. But to prove the loss, the court will only require the best evidence the nature of the case admits of; and the only way of proving the loss of any thing, is by shewing that it has been sought for, where it might have been expected to be found, or was usually kept, and that it could not be found.
4. So the destruction of a paper may be presumed from circumstances; as the burning of a house, the loss of a vessel, or the ravages of war.
5. A copy of a deed executed in 1779, and recorded in the Register's office in Charleston, was admitted in evidence upon proof of diligent search having been made, where it was probable it should be, on the presumption of its having been destroyed during the revolutionary struggles.
6. See note (a) p.

DEMURRER.

1. Upon demurrer, notwithstanding the defects of the pleading demurred to, the court will give judgment against the party whose pleading was first defective in substance.—*Talvande, vs. Cripps*, 147

DEVISE.

See Will.

DISCHARGE.

See Bills of Exchange and Promissory Notes.

1. The acceptance of an obligation of an inferior, or even of an equal, degree does not extinguish a prior obligation.—*Bailey, vs. Wright*, 484
2. So, the taking of a new bond, it seems, is no extinguishment of a prior bond, and the obligees may proceed on either.

DISCOUNT.

See Insolvent Debtor.

1. Debts to be set-off must be man-

ually subsisting debts at the time the action is brought; and where the defendant had made a conditional bargain for a note against the plaintiff with a third person, but the agreement was never executed till the suit was brought, it is not such a subsisting debt as can be set off.—*Shepherd, vs. Turner*, 249

2. So, the same doctrine prevails in cases of bankruptcies. The set-off must have been an existing debt between the parties, at the same time the bankruptcy happens.

3. So, the same rule applies with regard to administrators. The set-off must have been mutually subsisting at the death of the intestate.

4. The cases of *Reynolds, vs. Barling*, and *Sullivan, vs. Montague*, (*Doug.* 106-112.) said to be overruled.

5. To an action on a contract containing mutual covenants, the defendant to take advantage of any breaches on the part of the plaintiff, by way of discount, must specify the breaches particularly in his notice of discount. *Maverick, vs. Gibbs*, 316

6. To an action brought upon a note given for the purchase money of a tract of land, the defendant cannot set up by way of defence, an outstanding title for a part of it, which out standing title had been bought up by the plaintiff (vendor) since he sold to the defendant;

For if a man sell land to which he has no title, and afterwards acquire a title, he is estopped by his first deed to say he had no title at the time he sold.—*Craig, vs. Keeder*, 411

7. A plaintiff may, at any time before the verdict is read by the clerk, submit to a nonsuit, and a defendant who pleads a discount, may, under the same circumstances, discontinue or withdraw his discount.—*Dove, vs. Hanks*, 555

DISTRESS.

See *Replevin. Tenants in Common.*

1. A landlord cannot distress upon any other property than *personal chattels*.—*Hamilton, vs. Reedy*. 38
2. But he cannot distress upon *personal chattels* after they are in the custody of the law, viz: as after being levied on under a *fi. fa.* 1b
3. By the statute of Anne, no *goods or chattels* taken on any lands leased for life, years, &c. shall be taken in execution, unless the party, at whose suit the execution is sued, before removal of goods, pay to the landlord the arrears of rent, if not exceeding one year's rent. 1b
4. But the same right of the landlord does not exist as to *chattels real*; but chattels real may be sold exclusively for the satisfaction of the execution.—*Ib.* 39
5. What is a sufficient notice, see note (a) 39
6. In an avowry for double rent, under the act of 1808, the avowry need not state that three months notice in writing to quit was served on the tenant, where the tenant himself gave such notice of his intention to quit.—*Tulwade, vs. Cripps*, 147
7. After verdict upon an avowry for double rent, a demand before the distress will be presumed. But when the tenant himself gives notice of his intention to quit, a demand may be made after distress; and *quere*, if any demand is necessary. 1b
8. Notice by the landlord to the sheriff, before the whole of the goods are removed off the premises, is in time, under the statute 8 Anne, c. 17, to entitle the landlord to demand of the sheriff one year's rent; or should the goods sell for less than one years rent, then for as much as they produce, after paying the sheriff such costs as were incurred before notice given him of the rent due, and after all just allowances.—*Margart, vs. Swift*, 378
9. The acceptance of an obligation of an inferior, or even of an equal

degree does not extinguish a prior obligation.—*Bailey, vs. Wright*, 484

10. The giving of a bond or note for rent is no satisfaction, because the party has a higher security by distress. 1b
11. The landlord cannot distress until the rent is due by the terms of the agreement. 1b

EJECTMENT.

See *Trespass to Try Title*.

EQUITY OF REDEMPTION.

See *Mortgage*.

ERROR.

See *Pleading*.

ESCHEAT.

1. By the act of 1787, persons who claim lands by grant, previous to the 4th July, 1776, or by five years possession previous to that time are exempt from the operation of the escheat laws.—*Wilkins vs. Turt*, 518
2. If the statute of limitations has run against an individual before his death, the escheat laws, after his death, cannot operate against the individual who has acquired a title by possession. 1b
3. When escheated lands, by act of assembly, are vested in the trustees of a public Academy, they may be barred by the statute of limitations. 1b

ESTOPPEL.

1. Neither the plea of *nil habuit in tenementis, nil demisit, nor rien passa*, can be pleaded to covenant for rent on an indenture, for it operates as an estoppel.—*Maverick vs. Lewis & Gibbs*, 211
2. But the estoppel only exists during the continuance of the occupation of the tenant; and if he be ousted by a paramount title he may plead it 1b
3. An outstanding title, alone, will not discharge a lessee by indenture. He must be evicted, or prevented from entering or from enjoying the thing demised, by virtue of such title; and he must set out the title in his plea, and

- show particularly how it arises. *Ib.*
4. Where a person was in possession by an outstanding lease, and refused to give possession to the lessee, it is tantamount to an eviction. *Ib.*
 5. Upon an action brought upon a note given for the purchase money of a tract of land, the defendant cannot set up by way of defence, an outstanding title for a part of it, which outstanding title had been bought up by the plaintiff (vendor) since he sold to the defendant; for if a man sell land to which he has no title, and afterwards acquire a title, he is estopped by his first deed to say he had no title at the time he sold.—*Craig vs. Reeder*, 411
 6. Where a defendant was taken under a bail writ, and the sheriff, by mistake took a bond for the prison bounds, stating defendants imprisonment to have been under a *ca. sa.* the court held the bond void, and that the defendant was not estopped to shew that there was no *ca. sa.*—*Miller vs. Bagwell*, 429
 7. A recital to amount to an estoppel, must come from the party to be estopped, and not from the opposite side. *Ib.*
 8. What cases amount to an estoppel and what not. *Ib.*
- EVICTION.
1. Where a person was in possession by an outstanding lease, and refused to give possession to the new lessee, it is tantamount to an eviction.—*Maverick vs. Gibbs*, 212
 2. No particular words are necessary to constitute a lease, but there must be an interest in the freehold conveyed. And an agreement to take charge of a farm and to work on shares is not such an outstanding lease, as will amount to an eviction, where the person in possession under such agreement refused to deliver possession to the lessee. *Ib.*
- EVIDENCE.
1. Payment made after suit brought can not be given in evidence under the general issue; but all matters of defence arising after action brought must be pleaded *pais darrien continuance*.—*Elms & Co. vs. Beers and Bunnell*, 1
 2. Facts and circumstances may be given in evidence, by way of mitigation, which were the inducements to a transaction; even though they may happen to involve character.—*Rhodes vs. Bunch*, 68
 3. So in trespass *quare clausum fregit*, in mitigation, defendant may prove the land to be his, and that the plaintiff had obtruded himself into the possession, that he was a vagabond, and that he had obtruded himself into the place for the purpose of preying upon the neighborhood and trading with their slaves. *Ib.*
 4. In an action by the indorsee against the drawer, the indorser is a competent witness to prove usury.—*Knighl vs. Packard*, 71
 5. The doctrine, in *Wallon vs. Shelly*, "that a person is not a competent witness to impeach a security which he has given, though he is not interested in the event of the suit," is not the rule in this state; but on the contrary that of *Jordaine vs. Lashbrooke*, is the law of this state. *Ib.*
 6. The case of *Cantley vs. Sumter*, (2 Bay 93.) said by the court to be incorrectly reported; as the witness offered there, was the plaintiff in the cause, upon which ground he must have been rejected. *Ib.*
- On this subject see the cases collected in note (c) page 73
7. The act which authorizes a survey in trespass to try title is not imperative, and was never designed to be used when unnecessary. Either party may resort to it, to prove the identity of their lands, where they have not other sufficient evidence thereof.—*Cruikshanks vs. Freeman*, 84
 8. Where judgment goes by default evidence of the *locus in quo* is unnecessary. *Ib.*
 9. *Quere*. Whether under the statute of frauds, parol evidence is admissible to prove the consideration of an undertaking to pay

- the debt of another, when it is not expressed in the agreement itself.—*Leat vs. Tavel*. 158
10. The cases of *Wain vs. Wallters*, *Ransay vs. Winn*, questioned and commented on. *Ib*
11. *Johnson, J.* Thought if the contract consisted of mutual promises, the whole should be in writing, as constituting the agreement; but if of a promise founded on a past consideration, the promise only need be in writing. *Ib*
12. The court connected an order, written to defendant, to the promise in writing, of the same date, to shew the consideration; the order being written on the faith of funds in his hands.
13. Where the defendant drew an order on another person in favor of the plaintiff, the plaintiff must allege and prove in a suit against the drawer that he presented the order, that it was not accepted, or that it was accepted and not paid, and that the defendant had notice of the non acceptance or non payment. Merely stating that such third person, "although often requested to pay to the plaintiff, had hitherto wholly neglected and refused," is not a sufficient allegation.—*Treadway vs. Nicks*. 195
14. In declaring on contracts not under seal, which do not contain within themselves the acknowledgement of a consideration, or from which a consideration is not implied by law, it is incumbent on plaintiff to set out and prove a consideration. *See the Appendix*.
15. What is sufficient evidence to prove a deed where one subscribing witness made his mark and did not remember it, and the other witness not recollecting the fact either.—*Martin vs. Quattlebaum*, 205
16. The delivery of property, on the marriage of a child, is presumption of a gift, and will be considered as such, unless there be something to counteract the presumption, and this without regard to time.—*Bell vs. Strother*, 207
17. The subscribing witness to a contract, whether under seal or not, must in all cases at common law, be produced if alive, and within the jurisdiction of the court.—*Townsend vs. Corington*. 210
18. The act of 1802, is confined to bonds and notes, and as to them dispenses with the attendance of the subscribing witness, unless the defendant swear the bond or note was not signed by him, or in the case of an executor or administrator, that he believes it is not the signature of their testator or intestate. *Ib*. 220
- See Note of Cases*.
19. The declarations of a person who has taken possession of land and held it for five years, may be given in evidence to shew in what right he held, whether in his own right or as tenant.—*Hall vs. James*, 222
20. But a man's loose declarations will not be suffered to prevail against the truth of the case as ascertained on the trial. *Ib*.
21. Where a man's rights depend on his acts, his declarations may be given in evidence to shew the nature of those acts. *Ib*
22. In debt on an administration bond, against the administrator and security, a decree obtained before the ordinary against the administrator, may be given in evidence to shew the amount of damages. Though the security was not summoned when the administrator was called to account.—*Lyles vs. Caldwell, et al*. 225
23. The declarations of deceased persons, who shall appear to have been in a situation to possess the information, and not interested, are admissible, on questions of boundaries; as the declarations of surveyors, chain carriers &c.
24. But if the declarations are made *post litem motam* they are inadmissible, unless they are the repetition of the same declarations made before suit.—*Coate vs. Spear*, 227
25. See note of cases, where declarations or hearsay, may be given in evidence. 230

26. A parol release cannot prevail against a deed. So where A. gave the sheriff his bond to produce a slave named B. at a certain day, he cannot prove by parol that the sheriff agreed to receive a negro named C. instead of B.—*Perry vs. Clymore*, 245
27. The declarations of a surveyor, dead at the time of the trial, who originally located the land, are admissible, on a question as to the location. *Blythe vs. Sutherland*,
28. The declarations of a party when accompanied by an act, may be received in evidence as explanatory of that act as constituting a part of the *res gestæ*.—*Turnpin vs. Brannon*, 261
29. So, where the plaintiff gave in evidence the acknowledgments of B. an incompetent witness, that he held as tenant for the plaintiff, the defendant may prove B's declarations as to his motives and the manner of his tenancy, as explanatory of the act.
30. Where a tract of land was sold at sheriff sale as the property of C. in an action to try titles between A. against B. the purchaser, a plat of resurvey made for C. may be given in evidence to shew the extent of the defendant's possession.
31. There are some exceptions to the rule, that a judgment cannot be given in evidence to affect any but parties or privies; as where it constitutes a link in a chain of titles, or goes to establish a collateral fact; as to shew that the declarations of a tenant could have no effect upon the rights of the parties from the situation in which he stood.
32. No color of title is necessary to give a party a right by possession.
33. After the quiet enjoyment of lands for five years (now ten) the law presumes a title in the occupant which may have been lost by accident. The possession is substituted in the place of title.
34. The possession being proved by other evidence, the deed is only looked to as defining its extent, and for that purpose a mere survey is as high evidence.
35. If a person be in possession of a particular lot or tract of land, well known by a particular name, the bounds of which are distinctly marked, it would be sufficient to authorize the jury from possession of a part to find a verdict for the whole, even though the possessor should have neither deed nor plat.
36. Whenever, therefore, a person holds by possession only, a deed, plat or any other color or semblance of title, will, usually, furnish of itself sufficient evidence of the extent of his possession, without any other proof.
37. When he has not such evidence, he may resort to any other; such as visible marked lines, adjacent ditches, fences, or any other that shall be satisfactory to the minds of the jury.
38. Stale demands or claims of land are not to be encouraged.
39. There are two classes of cases in which parol evidence is admissible to explain or carry into effect a deed.
One, where the deed refers to any thing, of which it does not itself furnish evidence; as where a person sells *all the slaves* he owns at A., parol evidence may be given to prove the number he had at the place, at the time. Or where a man sells "his share of his father's estate," it is admissible to prove how much he was entitled to.
The other class, is where the deed upon its face is certain but some ambiguity is raised by parol, there the ambiguity may be removed by parol.—*Barkley vs. Barkley*, 269
40. Where a sheriff levied on "100 acres, more or less &c. being a part of an undivided tract, &c." and in his deed described it as "one hundred acres more or less, of land belonging to the estate of John Miller, dec'd," parol evidence is admissible to shew how

- much the *undivided part* was.
41. But as the deed conveyed one hundred acres it could not be proved by parol, that the defendant had one part by inheritance and another part by purchase, of *thirty acres each, and that only that part* was sold, which he inherited, as it would be contradicting or explaining the deed, the deed conveying more than both put together. But it would have been an ambiguity explainable, if the deed conveyed less than the two shares, and defendant might then, prove which share was sold.
42. When an ambiguity is created by parol, and the deed itself removes the ambiguity, parol cannot be admitted to control the deed.
43. The general rule is, that where there is any doubt as to the extent of the subject devised or sold, it is a matter of extrinsic evidence to show what is included under the description, as parcel of it.—*Note—lb.*
44. A date is not indispensibly requisite to a bond, as it takes effect from delivery, as in case of all deeds, and it is admissible by parol, to prove that it was delivered on a different day from that on which it is dated.—*Solomon vs. Davis,*
45. Where an action was brought by two partners, A. and B. on a book account and the entries were made by A,—B. can not be admitted to prove the entries made by A. unless it be clearly proved that A is out of the State.—*Walker & Bragg vs Parkham,*
46. A copy of the memorial of a grant from the State of North Carolina, with a copy of the plat, taken from the Secretary of State's Office, in North Carolina, regularly certified by the Secretary of State, and Governor of that state by the act of 1803, is admissible evidence in this state of a grant and survey, if the party so offering it swear that it is cut off his power to produce the original.—*Bird vs. Smith.*
47. By the law of England, a copy of a deed, duly enrolled, is as good evidence as the original itself; and was the law of this state till the case of *Purvis vs. Robinson*, a decision much to be regretted., decided that the loss of the original must be proved, to admit a copy—*Peay vs. Pickel,*
48. But to prove the loss, the court will only require the best evidence the nature of the case admits of; and the only way of proving the loss of any thing, is by showing that it has been sought for, where it might have been expected to be found, or was usually kept, and that it could not be found.
49. So the destruction of a paper may be presumed from circumstances; as the burning of a house, the loss of a vessel, or the ravages of war.
50. A copy of a deed executed in 1779, and recorded in the Registers Office in Charleston, was admitted in evidence upon proof of diligent search having been made, where it was probable it should be, on the presumption of its having been destroyed during the revolutionary struggles.
51. A shorter period than twenty years in this state, with additional circumstances will induce the presumption of the payment of a bond—*Blake vs Quash,*
52. Having settled an account in the mean time, without any notice taken of a bond, is such additional circumstances, as will induce the presumption of payment in less time than twenty years.
53. There are cases in this state, which would warrant a jury in being satisfied with circumstance, to raise the presumption of payment, less strong than may be required in England.
54. The acknowledgements, and even part payment, by an heir at law, on a bond, will not suspend the presumption of payment in a suit against the executor.
55. Under the particular circumstances, the court held the jury

- might well find for the defendant after a lapse of fourteen years, non-payment on a bond.
56. It seems there is a distinction between length of time as a bar, and where it is only evidence of it, in the latter case less time may raise the presumption.
57. To prove the amount of their liability, the decree in equity against the administrator may be given in evidence, on a suit against the securities on their bond.—*Curelens vs. Shelton*, 412
58. A recital to amount to an estoppel, must come from the party to be estopped, and not from the opposite side.—*Miller vs. Bagwell*, 429
59. What cases amount to an estoppel and what not
60. Parol proof is admissible to shew that a note had been given in substitution for two other notes, which were taken up, in order to admit the two notes in evidence, and to shew by the calculations made in figures on them, that the substituted note, by mistake, had been given for a wrong sum.—*Hampton vs. Blakely*, 469
61. Between the original parties, evidence may always be given of the true consideration of a note: So it may be proved that it was given for the balance due on a settlement of accounts, and that a mistake was made in the amount.
62. The rules of evidence are the same in law, as in equity, except in some particular cases where parol evidence is let in, merely with a view of affording the court of equity the means of exercising its peculiar jurisdiction.
63. Where parol proof cannot be admitted in equity, *a fortiori*, it ought not to be admitted at law.
64. The doctrine of parol evidence generally discussed.
65. Parol evidence may be admitted to shew that a note which had been given in pursuance of an award had been given for too much, in consequence of a mistake in the arbitrators which they themselves had afterwards dis-
- covered.—*McCravy vs. Jagers*, 478
66. Where a parent suffers property to go into the possession of a child upon marriage it is *prima facie* evidence of a gift.—*De-graffinreid vs. Mitchell*, 506
67. Where bond was given to the sheriff for the prison bounds, stating the consideration to be the fact of the defendant's being in custody under *ca. sa.* extrinsic evidence is inadmissible to shew that the defendant was confined in consequence of a *surrender of bail* after the judgment, but by inadvertence the bond was drawn for the prison bounds.—*Miller vs. Bagwell*, 522
68. Parol evidence is inadmissible to prove a different, greater or other consideration than that stated in a bond, and which should have been inserted, when it is not stated in the bond, "and for other considerations."
69. Nor can a recital of an important fact be varied by parol evidence; but on the contrary it is always to be taken most strongly against him who makes it; and in this case the recital of the *ca. sa.* was considered the recital of the sheriff and not of the obligor.
70. It is not a safe or salutary rule to allow a contract to exist partly in writing and partly in parol.
- EXECUTION.**
See Amendment.
1. By the act of 1815, the common law is altered, and a plaintiff may discharge a defendant in custody on a *ca. sa.* for a time, with his consent, without impairing his rights, and may retake him.—*Barnstine vs. Eggart*, 162
2. Executions bind property throughout the state, from the time they are entered in the sheriff's office.—*Woodward vs. Hill*, 241
3. But a party may loose his priority by delay; as the sheriff is not bound to notice any executions but those in his own office
4. But if an execution be sent to the sheriff from another district, he is bound to enquire when it was

- lodged in such district, and to pay what money he may collect to the oldest: but without such notice he will not be liable for money paid to a junior execution. *Ib.*
5. The act of 1799, requiring memorials of all judgments, to be recorded in Charleston, only relates to purchasers, or mortgages, or heirs, executors or administrators. *Ib.* 242
6. When a sheriff levies on personal property, it becomes his own, for all legal purposes. He can maintain an action for it, even against the debtor himself, at any time before the sale, or satisfaction of the execution.—*McClintock vs. Graham*, 243
7. When the execution is satisfied, if otherwise than by sale of the property, the right of the debtor recurs, and the right of the sheriff ceases to exist against him. *Ib.*
8. The sheriff's right, still, however, until return of the property to defendant, remains against every other person, than the owner, for the owner looks to the sheriff for a return of the property when the execution is satisfied, and the sheriff may maintain trover against any but the lawful owner, for a conversion. *Ib.*
9. Under the act of 1815, allowing executions to be issued at any time within three years after the signing and enrolling of judgment, without any revival of the same, where a judgment was signed 29th April 1822, and *fi. fa.* issued the next day, which was returned, without any proceedings; and no other proceedings had until a *fi. fa.* was issued the 18th April, 1826, and on the 15th June, a *ca. sa.* under which the defendant was imprisoned, the court discharged the defendant, and set aside the *ca. sa.* on the ground, that it issued more than three years after judgment, and was not a renewal of the *fi. fa.*—*Primrose vs. Becket & Wilkins*, 418
10. A levy is *prima facie* evidence of satisfaction; and where a *ca. sa.* was executed but four days after a levy, before it was possible the levy could have been dis-
- posed of, it was held, that all the proceedings under the *ca. sa.* were void.—*Miller vs. Bagwell*, 423
11. It is no defence to an action against the securities on a prison bonds bond, that property of the defendant had been sold under a *fi. fa.* for the plaintiff may take out both a *fi. fa.* and *ca. sa.* at the same time, provided he proceed but upon one. *Ib.*
12. Upon an appeal from a magistrate to the court of common pleas, upon the determination of the appeal, execution must issue from that court, against the party cast in the appeal.—*Pringle vs. Lansdale*, 429
13. And the clerk of the court must sign the execution. *Ib.*
14. The execution is not to be issued by the magistrate from whom the appeal has been taken up. *Ib.*
15. A man's house may not be broken open to take his own person or one of his family or his goods under an execution; but the sheriff upon request and denial may break the house and do execution upon the body or goods of a third person.—*Degrassin read vs. Mitchell*, 508
16. A man's house is not a castle or defence for any other person, but for the owner, his family and goods, and not to protect another who flyeth into the same. *Ib.*
17. So, where the slaves of a third person were concealed in the plaintiff's house, it was held the sheriff might break open the doors to take them in execution, upon request and refusal to deliver them. *Ib.*
18. Where a friend of a defendant, with a view to procure indulgence for the defendant, paid part of the judgment against the defendant to the plaintiff's lawyer, upon condition that no credit should be given on the judgment, but the judgment to be assigned to the person so paying the money, as a security for the money advanced, the court refused a rule upon the plaintiff's attorney

- to compel him to enter a credit upon the judgment for the amount he had so received.—*Carson vs. Richardson*, 528
19. No subsequent execution can issue, until the preceding one be regularly returned. And where a *fi. fa.* and *ca. sa.* are taken out together, both must be returned before another can issue.—*Jenkins vs. Mayrant*, 580
20. To ascertain whether an execution has been issued in proper time or not, reference must be made to the actual time of *suing out the writ*, and not to its *test*. 1b.
- EXECUTOR & ADMINISTRATOR.**
1. Where a testator devised lands, "to be sold at the discretion of his executors," to be vested in securities for his nephew, &c. and appointed two executors, one of whom only qualified, and the other removed from the state, he alone who qualified may sell and convey the lands.—*Chanet v. Villepenteaux*, 29
2. A naked power given to two by name, must be executed jointly, but when the power is coupled with a trust, and it is evidently the intention of the testator, that the trust shall be executed, in order to affectuate some provisions of his will, then the power may be exercised by one executor, the other not having qualified, the power being *virtute officii*, and not personal. 1b.
3. In debt on an administration bond, against the administrator and *security*, a decree obtained before the ordinary against the administrator, may be given in evidence to shew the amount of damages; though the security was not summoned when the administrator was called to account.—*Lyles vs Caldwell*, 525
4. It is not necessary to summon the *security* to an administration bond, before the ordinary, when the administrator is called to account. 1b.
5. An action cannot be maintained at law, on a guardianship bond, (as in case of an administration bond) before the accounts have been adjusted and a specific sum decreed to be paid over.—*Ordinary vs. Maddox*, 237
6. There is no privity between the administrator of an executor and the testator. An administration *de bonis non* must be taken out.—*Williams vs. Seabrook*, 371
7. But an administrator may bring an action upon a bond given to his *intestate* as executor of a third person; more especially where the bond was given to the executor "his heirs, executors, administrators &c" 1b.
8. On the death of the testator, and even before *probate*, his personal estate is vested in the executor, who may maintain an action for any part of it, even before *probate*. 1b.
9. But it seems he cannot declare till *probate*.—*Note*, 371
10. Where the ordinary at the motion of securities to an administration bond, discharges the administrator and appoints a new administrator, the securities to the first administrator are still liable for all defaults of their administrator to the time of his discharge.—*Cureten vs. Shelton*, 412
11. To prove the amount of their liability, the decree in equity against the administrator may be given in evidence, on a suit against the securities on their bond 1b.
12. But where a part of the items in the decree, was for other matters than those of the administration, and a verdict was taken against the securities for the whole amount; the court granted a new trial *nisi* the plaintiff released the amount of such items. 1b.
13. Where an administrator contracted to buy a certain quantity of corn, the court held it immaterial whether he bought it for the estate or for his own use, and that he was liable individually upon such a contract, and that it need not be in writing, not being within the statute of frauds.—*Harrell vs Witherspoon*, 409
- FEE.**
1. A lawyer is entitled to his counsel fee, although he does not argue the case, where an argu-

ment was unnecessary. And the fact that two other counsel were engaged before him, and that the rules of court allow but two to argue cases, will not deprive the third counsel of his fee, unless the party shews he has neglected his duty.—*Golthwaits vs. Dent*, 296

FIXTURE.

1. The doctrine of fixtures is more rigorous in relation to claims between heirs and executors, than between those of landlord and tenant and the tenant for life and the remainder man or reversioner.—*McClintock vs. Graham*,
2. A Still, fixed in a rock furnace built against the wall of a house, constructed for the purpose of distilling, is not a fixture, it seems, which passes with the land at sheriff sale, more especially as the previous owner of the freehold, himself, had made a severance.

FORECLOSURE.

See Mortgage.

FORGERY

1. The forgery of a receipt for a note, is not such a forgery as is indictable under the act of 1801, similar to the statute 2 Geo. II. ch. 25, which only punishes the forgery of a receipt for money or goods.—*State vs. Foster*,
2. To bring the indictment within that act, it must state the receipt to have been either for goods or money.
3. The person whose receipt was so forged is a competent witness; more especially as all the matters between the parties, to which the receipt related, were already settled.
4. A record of a judgment, under an award, between the prisoner and the prosecutor, was held competent evidence, to shew that all matters in dispute between the parties had been settled, to which the receipt forged related, to shew the prosecutor had no interest.

FRAUDS, STATUTE OF

1. Quere? Whether under the Sta-

tute of Frauds, parol evidence is admissible to prove the consideration of an undertaking to pay the debt of another, when it is not expressed in the agreement itself?—*Lecat vs. Taval*,

158

2. The cases of *Wain vs. Wartera*, *Ramsay vs. Winn*, questioned and commented on.

Ib.

3. *Johnson, J.* Thought if the contract consisted of mutual promises, the whole should be in writing, as constituting the agreement, but if of a promise founded on a past consideration the promise only need be in writing.

Ib.

4. The court connected an order, written to defendant, to the promise in writing, of the same date, to shew the consideration; the order being written on the faith of funds in his hands.

553

Ib.

5. It is not necessary to the validity of a promise to pay the debt of another, that the party to be charged, should derive a benefit.—If it be a damage to the other party, or a suspension, or forbearance of his right, it is sufficient. Or if the contract imports a benefit to the person for whom the thing is to be done, or delay in the collection of a debt, or a temporary discharge from a *ca. sa.*—*Barnstine vs. Eggart*,
6. By the act of 1815, the common law is altered, and a plaintiff may discharge a defendant in custody on a *ca. sa.* for a time, with his consent, without impairing his rights, and may retake him.

Ib.

102

Ib.

Ib.

7. For a collection of cases in relation to promises to pay the debts of another—see Appendix "A."
8. The plaintiff sold and conveyed to the defendant a tract of land, upon which the defendant entered and took possession. Upon an action of assumpsit for the purchase money, the court held, that the plaintiff might recover, although the contract was never reduced to writing. For the contract was at an end, and there was nothing left but a promise to pay in consideration of the land thus actually transferred.

Ib.

Ib.

Wood vs. Gee,

421

9. Or where, upon a parol contract for the sale of lands, the contract

- has been executed by one party, assumpsit may be maintained for the purchase money
10. Upon a sale of lands at auction, the clerk, of the auctioneer, is not such an agent of the parties whose entry will take the case out of the statute of frauds.—*Meadows vs. Meadows*, 458
11. An entry, to be a compliance with the statute, must contain a memorandum of the contract, and must state distinctly the article sold, the price and the purchaser's name.
12. An entry in these words: "The tract of land to Wm. Meadows at \$5.48," is insufficient.
13. It seems, an auctioneer is a sufficient agent of both parties, on a sale of lands, whose entry of the memorandum of sales will comply with the statute. See cases in note.
14. Where an administrator contracted to buy a certain quantity of corn, the court held it immaterial whether he bought it for the estate or for his own use, and that he was liable individually upon such a contract, and that it need not be in writing, not being within the statute of frauds.—*Jarrell vs. Witherspoon*, 486

FREIGHT.

1. The consignor is liable to the carrier for freight; and the carrier is not bound to look to the consignor's factor for it; and no legal usage or custom to the contrary exists in Charleston.—*Haywood vs. Middleton*, 121
2. If the consignee be liable, it does not free the consignor from his liability, as two may be liable for one debt. Ib.

GUARANTY.

See *Frauds, Statute of*, and *Appendix "A."*

GUARDIAN.

1. A guardian appointed by the court of law to superintend the interest of a minor, in the partition of an intestate's estate, must have notice of it, and express his intention to accept.—*Barns vs. Branch*, 179

2. An action cannot be maintained at law, on a guardianship bond, (as in case of an administration bond) before the accounts have been adjusted and a specific sum decreed to be paid over.—*Ordinary vs. Maddox*, 237
3. The legislature by giving the court of Common Pleas authority to appoint guardians, did not transfer to that court all the powers of the court of equity connected with the subject, and it has no power to call them to account.—*Harrington vs. Cole*, 209
4. Executors, administrators and guardians all stand in the same relation of trustees, and their transactions are only examinable in a court of equity, or some other court specially authorized to examine and adjust their accounts. Ib.
5. Where a guardian, is appointed by the ordinary he has jurisdiction over the subject, but a very inadequate one, as he cannot compel obedience to his decrees; and his proceedings may be examined by a court of equity. But the court of law cannot take cognizance of the matter. Ib.
6. What was said in *Anderson vs. Maddox*, that "if the plaintiff (in an action on a guardianship or administration bond) set out the condition of the bond in his declaration, and assign a specific breach, so that it shall appear to the court, that no enquiry into the state of the defendant's accounts will be necessary, an action might be brought on the bond in a court of law," said to be an erroneous impression thrown out by the court; as the plaintiff cannot by his manner of assigning the breach, restrict the defendant in the nature of his defence. Ib.

7. An action cannot be maintained on a guardianship (or administration) bond although the guardian has been cited to account, but has failed to do so. Ib.

HEARSAY.

See *Evidence*.
See when admitted, 230-261

HIRE.

See *Warranty. Bailment. Slave.*

HUSBAND AND WIFE.

1. Where husband and wife have separated, and the wife has acquired some personal property, in a suit for a trespass to such property, it is error to join the wife with the husband.—*Robards vs. Hulson*,

475

INDICTMENT.

1. When two persons are indicted together, for stealing the same goods, one cannot be convicted of petit larceny and the other of grand larceny.—*State vs. Wilson and Davis*,
2. So it seems of burglary, if one be convicted of larceny only, the other cannot be convicted of burglary.
3. When new trial granted for want of evidence, in an indictment for larceny.
4. In indictments, it seems, neither clerical nor grammatical errors will vitiate, unless they change the word or obscure the meaning.—*State vs. Wimberly*,
5. On an indictment, under the act of 1821, for killing a slave in sudden heat and passion, charging it to have been done feloniously, does not vitiate the indictment.
6. The indictment in this case was in accordance with the precedents at common law for manslaughter and was held to be good.
7. It is a general rule that the special manner of the whole fact should be set forth in the indictment with such certainty, that the offence may judicially appear to the court; but precise phraseology need not be used, except when technical words are necessary in the description, to give character to the offence. It is sufficient if the idea is clearly and distinctly expressed.
8. So, in indictments for murder or manslaughter, it is indispensably necessary to state that the death ensued in consequence of the act of the prisoner.

187

1b

1b

190

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1b

9 Under the act of 1822, rendering it indictable for "knowingly and wilfully packing or putting into any bags, bales or bales of cotton, any stone, wood, trash-cotton, cotton seed, or any matter or thing whatsoever &c.," a person may be convicted for fraudulently packing, putting and pouring a large and undue quantity of water into bales of cotton with intent to cheat and defraud &c.—*State vs. Holmon*,

806

10 The expression "any matter or thing," is not restricted to the things, "stone wood, &c." specified in the preceding part of the clause.

1b

11. The rule, that general terms in a criminal statute are restricted, to the particular offences enumerated, does not apply, except in those cases where there is some repugnance or incompatibility between the specific and general expressions

1b

12. As, under the act against trading with a slave, the selling goods to a slave for cash, was held indictable under the general words of the act "or shall otherwise deal, trade or traffic."

1b

13. At common law a receiver of stolen goods, was not an accessory, but could only be punished as for a misdemeanor.—*Butler and Quin ads. The State*,

383

14. But by the statute 3 and 4, Wm. and Mary, c. 9, all receivers of stolen goods are made accessories after the fact.

1b

15. An indictment need not state under which particular statute it is framed; it is sufficient to say against the statute, generally.

1b

16. But if the indictment profess to recite the statute, a material variance will be fatal, or if the statute do not support the verdict, it must fail.

1b

17 All indictments upon statutes must state all the circumstances which constitute the definition of the offence in the act, so as to bring the defendant precisely within it.—*State vs. Frost*,

444

18. A conclusion "contrary to the form of the statute, &c." will not

said the defective statement of the crime. Not even the fullest description of the offence, even in the terms of a legal definition, will be sufficient, without keeping close to the expressions of the statute.

19. On an indictment for killing a slave "in sudden heat and passion" contrary to the act of assembly, the jury found a verdict of "guilty of manslaughter." Upon which the court held judgment could not be passed.—*State vs. Rains*, 533

20. The crime, by act of assembly, of killing a slave *in sudden heat and passion*, is a different offence from the common law crime of *manslaughter*.

21. It is not enough to say, in an indictment, that a crime has been committed, in the words of the act; but it is also necessary to specify on the face of the indictment the criminal nature and degree of the offence, and also the particular facts and circumstances which render the defendant guilty of the offence.

22. The act of 1821, rendering it murder to kill a slave, does not take away from the prisoner, if he be master or overseer in whose possession the slave was killed, the right of exculpating himself by his own oath. And the fact of a third person coming up at the moment of the death of the slave, after the wounds were given, will not alter the case.

INFANT.

See Pleading 2.

1. An infant who lives with and is properly maintained by her parents, can not bind herself to a stranger for necessities; and where daughters live with their mother, it should be presumed that they are properly maintained by their parent until the contrary be proved; for the mother being the best judge of what is necessary for them, should be consulted before credit is given them.—*Connolly, ads Hull*,

2. An infant is not bound by a submission to an award, and a note given by him, in pursuance of an award, is void, though the matter submitted was a *tort* committed by the infant.—*Hanks, ads Deal*, 257

3. An infant is liable for torts, but it does not follow that his contracts in compensation for torts are valid. *Ib.*

INSIMUL COMPUTASSENT. *See Pleading.*

INSOLVENT DEBTOR & PRISON BOUNDS.

1. A defendant who has given his bond for the prison bounds may be allowed to file his schedule, *nunc pro tunc*, after the 40 days, where it had not been done during the forty days, on account of the sickness of his attorney and no neglect on the defendant's part, the schedule having been left with attorney before expiration of forty days.—*Crovet, vs. Coburn*, 14

2. Where a petitioner for the benefit of the prison bounds act, was convicted before a jury of *fraud*, but a new trial was granted to him by the consent of his suing creditor, the court held, he was not deprived, by such conviction, of the benefit of the act, under a *ca. sa.* by another creditor; as the new trial annulled the verdict of *fraud*, though it was obtained by consent, and not upon argument; and the parties stand as before the new trial.—*Gibson, Falconer, & Co. vs. Steele*, 45

3. The assignees, under an assignment of an insolvent debtor, take the property, subject to all the incumbrances, leins, &c. and in the same manner, to which it was subject in the hands of the assignor.—*Mairs, vs. Smith*, 52

4. The property assigned is not to be rateably and proportionably divided among suing creditors, and all other creditors who come in for a dividend; but creditors maintain their leins, in the same

- order as against the debtor before the assignment.
5. This court will entertain appeals from all orders made at chambers, which are, in their operation, exclusive as to the rights of the parties; as all motions for the benefit of the prison bounds act, &c.—*Knight, vs. Braker*,
 6. A defendant against whom a verdict for damages has been found, for killing the slave of the plaintiff, is entitled to the benefit of the prison bounds act.
 7. The cases excluded from the benefit of the act, as "wilful & malicious trespasses," are such as are included in the statute of 22 and 23, Car. II. c. 7, by "malicious mischief."
 8. The right of the plaintiff to imprison his debtor until he pays the debt, forms no part of the *lex contractus*. The obligation to make satisfaction must always exist; and the right to discharge a debtor from prison, upon a surrender of his property, does not affect the right of satisfaction; but is a part of the *lex fori*, with a view to which people always contract, and therefore becomes a part of the *lex contractus*. It does not impair the right of the creditor over future acquisitions of the debtor.—*Lowden, vs. Moses*,
 9. The right to imprison the debtor is no part of the contract, but a punishment for not performing it, which the state may refuse to inflict, or may modify or discharge, and the contract is still left in full force.
 10. A vendue master, imprisoned under a *ca. sa.* at a time when vendue masters were prohibited from the benefit of the prison bounds and insolvent debtors acts, upon a revocation of the act depriving vendue masters of such benefit, is entitled to the benefit of the repealing act, and are put on a footing with other debtors.
 11. Not filing a schedule within 40 days, only deprives the debtor of the benefit of the *prison rules of limits*, but does not deprive him of the final benefit of the act, but he may render it in at any time during his confinement,
 12. A vendue master not having rendered a schedule within forty days, at a time when he was deprived of the benefit of the insolvent debtors and prison bounds acts, is not precluded, when the privilege of those acts are again restored to vendue masters by the legislature.
 13. An insolvent debtor, who assigns under the insolvent debtors act, is considered as having assigned over only so much of his choses in action, as shall appear upon settlement to have been actually due at the time of the assignment. The balance is vested in his assignees, but no more.—*Lourie, vs. Williamson*,
 14. In a suit by the assignees of an insolvent debtor, a person who owed an insolvent debtor at the time of the assignment made, will not be permitted to set off a debt afterwards acquired, but may set off any that he had before the assignment, though the suit be brought within a year.
 15. The cases must be governed by the state of things at the assignment.
 16. Debts to be set-off must be mutually subsisting debts at the time the action is brought; and where the defendant had made a conditional bargain for a note against the plaintiff with a third person, but the agreement was never executed till the suit was brought, it is not such a subsisting debt as can be set off—*Shepherd, vs. Turner*,
 17. So, the same doctrine prevails in cases of bankruptcies. The set-off must have been an existing debt between the parties, at the time the bankruptcy happened.
 18. So, the same rule applies with regard to administrators. The set-off must have been mutually subsisting at the death of the in

- testate.
19. The cases of *Reynolds, vs. Baring*, and *Sullivan, vs. Montague*, (*Doug.* 106-112,) said to be over ruled.
20. Under the 7th clause of the insolvent debtors act, requiring certain creditors to come into court and prove their claims, a judgment creditor is not included.—*Pohl, vs. Lynch*, 38
21. The act is confined to "conveyances, bills of sale, assignments and mortgages.
22. Where a bond is given for the prison bounds act, and the debtor remains within the rules forty days, without rendering his schedule, and is then committed to the jail, the securities are not thereby discharged from liability on the bond; but the plaintiff has the double security of the bond, and the confinement of the defendant.—*Miller, vs. Ragwell*, 429
23. To debt on a bond against the securities for the prison bounds, defendants pleaded performance generally, and replication that the defendant did not render in a schedule, &c. according to the condition of the bond, a rejoinder that the securities surrendered the principal to the sheriff, who received him, and discharged them, was held ill, and not a good answer to plaintiff's replication.
24. The securities to a prison bounds bond cannot discharge themselves by a surrender of their principal to the sheriff.
25. It is no defence to an action against the securities on a prison bounds bond, that property of the defendant had been sold under a *fi. fa.* for the plaintiff may take out both a *fi. fa.* and *ca. sa.* at the same time, provided he proceed but upon one.
26. Where an application is made before the clerk of the court, as commissioner of special bail, during the sitting of the court, to discharge a prisoner, under the prison bounds act, and the clerk is too busy to attend to it, the court
- 1b. itself may hear the motion, their jurisdictions being concurrent. *Crryton & Sloan, vs. Dickerson*, 436
27. The payment of a debt on the day a defendant is arrested, is not such an *undue preference* of one creditor to another as will deprive the defendant of the benefit of the prison bounds act, although the property assigned was not sufficient to pay plaintiff's debt. 1b
28. The payment must be accompanied with a purpose of preferring one creditor to the injury of another. 1b
29. Where fraud is alleged against a party swearing out, the judge may either submit the matter, if the facts be complicated, to a jury, or he may decide them himself. 1b
30. Explanation of the case of *Stover vs. Duren*, (2 *M'Cord*, 266.) 1b
- ### INSURANCE.
1. On a policy "at and from Charleston to Marseilles," the fact that the vessel had been laden at Havana, and only touched at Charleston, not having been mentioned in the offer, was held to avoid the policy, although the underwriters may have known the fact; Havana being a belligerent port, and the danger increased thereby. *Nott, J.* dissenting.—*Stoney vs. Insurance Company*, 387
2. Where the assured undertake to state all the circumstances which can affect the risk, they must do so fully and faithfully. The rule admits of no exceptions. It cannot be said after a loss has taken place, *that the insurers knew the fact*, and therefore it was not communicated. 1b.
- ### INTEMPERANCE.
1. The court will not readily lend an ear to a charge of incapacity, arising from intemperance, in order to invalidate a solemn act of an individual.—*Hall vs. Mooreman*, 477
2. If people will voluntarily incapac-

oitate themselves from doing their ordinary business they must take the consequences of their own imprudence; unless a fraud is committed upon them when in a state of intoxication their acts are binding.

INTEREST.

1. On a bond with a penalty of \$5000 to perform covenants, the jury found a verdict of \$500. Held that interest on the \$500 could not be collected.—*Thomas vs. Wilson.*
2. Interest on judgments can only be collected where the original cause of action bore interest.
3. It is not necessary when one sues for a debt, that he should demand the interest.—*Kincaid vs. Neal,*
4. An alien enemy, who leaves the country and carries off his bond, is not entitled to interest on it during the continuance of the war.—*Blake vs. Quash,*
5. On a bond conditioned to pay several sums by different instalments "without interest, but with interest if not punctually paid," the money not having been punctually paid, it was held, that interest was recoverable from the date of the bond, and not from the time the instalments respectively became due; and the penalty became forfeited by the non-payment of the first instalment.—*Wakefield vs. Beckley,*
6. A distinction has been made with regard to interest between written and parol agreements. Interest is allowed in the former, when not in the latter.—*Ryan vs. Baidrick,*
7. Wherever an action is brought on a contract entered into for the delivery of a specific article, the value of that article, at the time fixed for the delivery, with interest, is the sum the plaintiff ought to recover.
8. So, upon a contract to allow an overseer 1200 lbs of cotton, on the first day of January for his years services, interest was allowed upon the value of the

cotton, at the time fixed for its delivery

9. It seems to be implied from the breach of a written promise to pay money on a given day, that the party will pay interest.
10. A tender of the principal, the absence of the party, or the intervention of war, it seems, are good causes for suspending the payment of interest in any case. But it is not a matter of discretion, but must depend upon some legal principle
11. It seems interest may be recovered in every case of a contract for the delivery of property or the payment of money, whether express or implied.
12. A jury will not be permitted to give more nor less than the value of the property. They must measure their damages by the legal rate of interest.

JOINT TENANTS.

See Tenants in Common.

JUSTICE OF THE PEACE.

See Magistrate.

JURISDICTION.

See Prohibition.

1. A note given in New Orleans by the debtor then living there to a transient person who indorses it to the plaintiff living in Charleston, may be sued upon before the city court, where the defendant the drawer has removed to Charleston, and is living there at the time suit is brought.
2. In proceeding to obtain partition at law, it must appear on the proceedings, that the ancestor died intestate.
3. A plaintiff has no right, without the consent of the defendant, by giving a credit, to reduce his demand within the summary process jurisdiction.
4. The parties, by mutual consent, cannot give jurisdiction, much less can one without the consent of the other.
5. So, the plaintiff cannot by releas-

- ing part of his demand, reduce his cause of action within an inferior jurisdiction.
6. In a suit in nature of a *quantum meruit* before a magistrate, for work done or services performed, the magistrate does not lose his jurisdiction upon proof that the services rendered were worth from \$15, \$50, or more than the jurisdiction extends to, where only \$20 are demanded; as a person may demand less than his services deserved.—*Golthwaite vs. Dent*, 296
7. So, it would seem upon a sale of goods, without any stipulated price; the vendor may charge less than they are worth, and sue in an inferior jurisdiction. *Ib.*
8. Under the acts of 1812, and 1817, magistrates and freeholders have no jurisdiction to put out a tenant who holds over under a *parol* lease.—*Bynum vs. Clark*, 298
9. By the act of 1817, power is only given to them, in those cases where the tenant shall make alterations or remove buildings on the premises, without the written consent of the landlord.
10. The legislature by giving the court of common pleas authority to appoint guardians, did not transfer to that court all the powers of the court of equity connected with the subject, and it has no power to call them to account.—*Harrington vs. Cole*, 509
11. Executors, administrators and guardians all stand in the same relation of trustees, and their transactions are only examinable in a court of equity, or some other court specially authorized to examine and adjust their accounts.
12. Where a guardian is appointed by the ordinary he has jurisdiction over the subject, but a very inadequate one, as he can not compel obedience to his decrees; and his proceedings may be examined by a court of equity. But the court of law cannot take cognizance of the matter. *Ib.*
13. What was said in *Anderson vs. Maddox*, that, "if the plaintiff (in an action on a guardianship or

administration bond) set out the condition of the bond in his declaration, and assign a specific breach, so that it shall appear to the court, that no enquiry into the state of the defendant's accounts will be necessary. an action might be brought on the bond in a court of law," said to be an erroneous impression thrown out by the court; as the plaintiff cannot, by his manner of assigning the breach, restrict the defendant in the nature of his defence. *Ib.*

14. An action at law cannot be maintained on a guardianship or administration bond, although the guardian has been cited to account, but has failed to do so. *Ib.*

LANDLORD AND TENANT.

See Distress. Rent.

1. Neither the plea of *nil habuit in tenementis, nil demisit, nor rien passé*, can be pleaded to covenant for rent on an indenture, for it operates as an estoppel.—*Maverick vs. Gibbes*, 211
2. But the estoppel only exists during the continuance of the occupation of the tenant; and if he be ousted by a paramount title he may plead it. *Ib.*
3. An outstanding title, alone, will not discharge a lessee by indenture. He must be evicted, or prevented from entering or from enjoying the thing demised, by virtue of such title; and he must set out the title in his plea, and shew particularly how it arises. *Ib.*
4. Where a person was in possession by an outstanding lease, and refused to give possession to the new lessee, it is tantamount to an eviction. *Ib.*
5. No particular words are necessary to constitute a lease, but there must be an interest in the freehold conveyed. And an agreement to take charge of a farm and to work on shares is not such an outstanding lease, as will amount to an eviction, where the person in possession under such agreement refused to deliver possession to the lessee. *Ib.*

6. Under the acts of 1812, and 1817, magistrates and freeholders have no jurisdiction to put out a tenant who holds over under a *parol* lease.—*Bynum vs. Clark*, 298
7. By the act of 1817, power is only given to them in those cases where the tenant shall make alterations or remove buildings on the premises, without the written consent of the landlord. *Ib*

LARCENY.

1. When two persons are indicted together, for stealing the same goods, one cannot be convicted of petit larceny and the other of grand larceny.—*State vs. Davis and Wilson*, 187
2. So it seems of burglary, if one be convicted of larceny only, the other cannot be convicted of burglary. *Ib*
3. When new trial granted, for want of evidence, in an indictment for larceny. *Ib*
4. At common law a receiver of stolen goods, was not an accessory, but could only be punished as for a misdemeanor.—*The State vs. Butler and Quin*, 383
5. But by the statute 34, "Wm. and Mary, c. 9." all receivers of stolen goods are made accessories after the fact. *Ib*
6. An indictment need not state under which particular statute it is framed; it is sufficient to say *against the statute*, generally. *Ib*
7. But if the indictment profess to recite the statute, a material variance will be fatal, or if the statute do not support the verdict, it must fail. *Ib*

LAWS.

1. It seems that all laws ought to be prospective in their operations, and where they are not so, but interfere with past transactions or contracts they are inconsistent with the principles of sound legislation and void.—*Lowden vs. Moses*, 93
2. A usage, to become law, must be of long standing, general in its operation and known to, and acquiesced in, by all those whose rights are affected by it, besides

being just and reasonable in its operation.—*Hayward vs. Middleton*, 121.

LEASE.

See *Landlord and Tenant*.

LEVY.

See *Execution*.

1. How to be made on the share of one partner only, see p. 33
2. A Levy is *prima facie* evidence of satisfaction; and where a *ca. sa.* was executed but four days after a levy, before it was possible the levy could have been disposed of, it was held, that all the proceedings under the *ca. sa.* were void.—*Miller vs. Bagwell*, 429

LIEN.

See *Execution. Insolvent Debtor*.

1. Where a magistrate issued an attachment, and a few days afterwards the defendant came in and confessed judgment, the court held that the lien of the attachment could not be postponed to subsequent judgments because no bond was to be found in the clerks office, as it will be presumed the magistrate did his duty and that the bond was lost, unless the contrary be shewn by more positive evidence.—*Kincaid vs. Neal*, 201
2. A third person, though a judgment creditor, can not set aside the lien of an attachment on account of irregularities in issuing and serving the attachment, the same having been waived by the defendant in attachment. *Ib*

LIMITATIONS, STATUTE OF

1. After a dissolution, one partner cannot bind the other by a new contract; but the promise of one will prevent the operation of the statute of limitations.—*Veal vs. Hassan*, 278
2. A second writ cannot be considered as an *alias*, if it be issued more than a year and a day after the first, and all the *intermediate* writs must be regularly lodged with the sheriff, and cannot, at a subsequent period, be made out, so as to fill up the intermedi-

- ate numbers, to prevent the statute of limitations.—*Bank vs. Baker*, 281
3. The statute of limitations will bar the vestry and wardens of a church, as well as any other persons.—*Vestry and Wardens, vs. Cauty*, 317
4. By the act of 1824, the statute of limitations shall not hereafter be construed to defeat the rights of minors, when the statute has not barred the right in the life time of the ancestor, before the accrual of the right of the minor.—*Gibson vs. Taylor*, 451
5. And where an action of trover was brought before the expiration of four years, and continued over until after the four years, and then the plaintiff was nonsuited, upon a second action being brought, the court, held that the plaintiff was barred by the statute.—*Barino vs. McGee*, 452
6. The rule still prevails, as to personal property, that where the statute of limitations begins to run, it will run on notwithstanding any intervening disabilities.—*McCollough vs. Speed*, 455
7. The act of 1824, to the contrary is only confined to actions concerning lands. *Ib*
8. Where the statute has not commenced to run against the intestate or testator, during his life time, it will not run against the administrator, till administration is granted. But where it commences to run against the intestate or testator, his death will not suspend it till administration is taken out. *Ib*
9. A trustee cannot acquire a title by the statute of limitations against his *cestuique trust*.—*Howard vs. Aiken*, 467
10. By the act of 1787, persons who claim lands by *grant previous to the 4th July, 1776, or by five years possession previous to that time*, are exempt from the operation of the escheat laws.—*Wilkins vs. Tarl*, 518
11. If the statute of limitations has run against an individual before his death, the escheat laws, after his death, cannot operate against the individual who has acquired a title by possession. *Ib*
12. When escheated lands, by act of assembly, are vested in the trustees of a public Academy, they may be barred by the statute of limitations. *Ib*
13. The following words were held sufficient to take a debt out of the statute of limitations, viz: "that the note had not been paid, and that he would not pay it, unless compelled by law, as it was out of date, and he had received no consideration for it."—*Lee vs. Perry*, 552
14. If the existence of the debt be acknowledged, there is a legal promise to pay, and the debt is not barred by the statute. *Ib*
- LOCATION.
See Survey. Evidence.
- LOCUS IN QUO.
See Trespass to try Title.
- LUNACY.
See Intemperance.
- MAGISTRATE.
1. A magistrate, having jurisdiction of the subject matter, cannot be made liable in a civil action, unless fraud or collusion be shewn; and such corruption must appear either from the grossness of the circumstances, or be proved *aliunde*.—*Peake vs. Cauty & Johnson*, 107
2. The act of 1740, authorizing magistrates to seize and sell horses belonging to slaves, is constitutional; for slaves can hold no property, nor sue or be sued; and the exercise of such authority by a magistrate in determining whether the horse belonged to the slave or not, is a judicial act. *Ib*
- MASTER AND SERVANT.
1. A master of a slave is not liable for damages resulting from the negligence or trespass of his slave.—*Wingis vs. Smith*, 400
2. But slaves who are tradesmen, ferry-men, carriers, and others acting in like capacities, form

exceptions to this rule. In such cases, the master by inviting others to repose confidence in them, becomes security for the faithful performance of their duty, and must be answerable for their neglect.

Ib

MALICIOUS PROSECUTION.

1. In an action for malicious prosecution, it is necessary to set forth, in the declaration, that the prosecution is at an end, and to shew in what manner it was terminated.—*Teague vs. Wilks*,

461

2. That the defendant was acquitted by the grand jury, or by a *noli prosequi* or by arrest of judgment, does not necessarily shew that the prosecution has been put an end to, and in such cases, it is, therefore, necessary to state that he was finally discharged, by order of the court

Ib

3. Where the declaration stated "that the plaintiff had been acquitted by the grand jury's finding "no bill," and that the said prosecution is wholly ended and determined, and he the said plaintiff wholly discharged therefrom, as by the records and proceedings thereof remaining in the said court appears," the court held it was a sufficient statement of the discharge of the plaintiff from the prosecution;

Ib

4. But that if it were not sufficient, it could only have been taken advantage of on demurrer, and was cured by pleading to the merits.

Ib

5. In a statement, that the plaintiff was acquitted, without specifying in what manner, the word "acquitted" is to be construed a technical word, which means, acquitted on trial by a petit jury;

Ib

6. But where the manner of acquittal, is set out in such a way as to shew that the word "acquitted" was not intended to be used in its technical sense, it will be taken with such qualifications.

Ib

7. Where a technical word is used without any qualifications the

court will give it its technical meaning, yet when it is accompanied with such qualifications as shew that it was intended to be understood in a different sense, it will be taken with such qualifications.

Ib

MANSLAUGHTER.

See *Slave. Indictment.*

MILITIA.

1. The act of 1794, requiring aliens to do militia and patrol duty is neither against the constitution of the United States, nor against the Laws of Nations.—*Anstey vs. Timmons*,

329

2. The constitution of the United States has not given to Congress the absolute and exclusive control over the militia of the States.

Ib.

3. It seems, the power given to Congress, by the 8th section of the first article of the constitution, is of a limited nature and confined to the objects specified in the clauses, and in all other respects and for all other purposes, the militia are subject to the control and government of their respective states.

Ib

4. The act of 1813, which avoids any civil process served on any person "when he shall be called out into service or embodied by the executive authority, or within thirty days after such person shall be discharged from the service," applies only to those cases where the militia are called out to actual service, in a state of actual warfare, or an emergency of war; and not upon an occasion like the reception of Gen. La Fayette.—*Kirkpatrick vs. Irby*,

205

MISDEMEANOR.

See *Indictment*

MONEY HAD AND RECEIVED.

1. Where the defendant sold and warranted a horse to the plaintiff and a prior lien deprived the plaintiff of the benefit of his purchase; and the parties agreed to estimate the damages at \$30 less

than the plaintiff had paid for the horse, the plaintiff may recover the \$70 either on a count for money had and received, or by a special count on the breach of warranty — *Rivers vs. Cain*,

239

MORTGAGE.

1. Where the plaintiff obtained judgment on a bond secured by mortgage and upon suggestion, obtained an order for the sale of the premises, under the act of 1791, and the premises were sold, the court, after the sale, granted leave to the plaintiff, to state in his suggestion, that intermediate judgments had been obtained against the defendant, since execution of the mortgage and plaintiff's judgment, which he had omitted, in his suggestion. — *Treasurers vs. Bourdeaux*,
2. A third person, because he claims the land sold, has no right to come into court to set aside the judgment, on account of defect in form.
3. A release of the equity of redemption completes the legal title in the mortgagee — *Taylor and Young vs. Stockdale*,

142

Ib

302

MURDER.

See Indictment

NECESSARIES.

See Infant.

NECESSITY.

1. The necessity from which a person derives a right of way, is when one person sells to another lands inclosed on all sides by his other lands, there the law imposes an obligation on the seller to allow the purchaser a way over his adjacent lands. — *Turnbull vs. Rivers*,
2. The inconvenience of going always to one's plantation by water, will not amount to such a necessity, as will give a way; for necessity and not inconvenience gives the way.
3. It seems, if a person owns land lying between two roads, one on the east and one on the west, and

181

Ib

79

shall sell that lying on the west, it gives to the purchaser no right of way across the seller's land, to the road bounding him on the east, whatever may be the distance or difficulty of getting to that road.

Ib

4. So; it seems, if a person should sell to another the extreme point of a neck or tongue of land, surrounded by an open sea, or navigable stream, except on one side, the fact of its being sometimes more convenient to the purchaser to pass through the vendor's land, than to go by water, will not give him a right of way; and the case is much stronger when it is not between vendor and vendee.

Ib

NEW TRIAL.

See Practice:

1. The court will grant a new trial *toties quoties* where the verdict is contrary to law; and when there is no evidence on which the jury can found their verdict, and the case is brought before the court in such a shape that it can put an end to unprofitable litigation by a nonsuit, it will be granted. — *Turnbull vs. Rivers*,

122

2. Where the death of the surveyor or whose declarations were offered in evidence was a matter of public notoriety, and the party inadvertently neglected to prove his death, and by direction of the court a verdict was found against him for that reason, the court granted a new trial, that he might prove that fact; as it was an inadvertence, from which the most circumstances are not exempt. — *Blythe vs. Sutherland*,

259

3. Applications for new trials, are, with some limitations always addressed to the discretion of the court, which has often granted them, when verdicts have been obtained by surprise or inadvertence.

Ib

4. The great objects of courts is to ascertain the truth of the facts between parties litigant, and where it is apparent that truth

has not been attained, and that without a fault in the party amounting to negligence, the court will give relief.

5. The granting of a new trial is matter of discretion, and will not be exercised where the court sees that justice has been done. — *M. Kie vs. Garlington*,

1b

6. So, in an action to try titles, where the original defendant was tenant to the plaintiff and had no right to dispute his title, and a motion was made by a third person to come in under the rule of court, as the real defendant, and the court refused the evidence of tenancy, but suffered the third person to come in and defend, and upon the trial it appeared that the plaintiff had no title, the court said although the evidence of the tenancy should have been admitted, and if proved the court thought the second defendant should not have been allowed to come in, yet justice having been done, a new trial would not be granted.

276

7. A verdict without evidence is contrary to law, and the court will always exercise the controlling power of granting new trials; and a similar finding of a second jury cannot alter the law, but the court will continue to grant new trials. — *Means vs. Moore*,

1b

7. Where justice has been done by the verdict of the jury, the court will not grant a new trial. — *Howard vs. Aiken*,

467

NON EST FACTUM, *See Pleading.*

NONSUIT.

1. Where judgment is obtained against one of several defendants, the plaintiff can not be nonsuited. — *Williams vs. Rearrs, et. al.*
2. A plaintiff may, at anytime before the verdict is read by the clerk, submit to a nonsuit, and a defendant who pleads a discount, may, under the same circumstances, discontinue or withdraw his discount. — *Dove, vs. Hank*,

294

558

NOTICE.

See Rent. Distress. Bills of Exchange and Promissory Notes. Sheriff

NUNC PRO TUNC.

See Practice

ORDINARY.

1. The court of law will not hear appeals from the ordinary on matters involving the settlement of accounts. — *Wallis vs. Gill*,
2. The object of appeals to that court is to require the aid of the court in those cases, where according to the common law mode of administering justice, the parties could have the benefit of that jurisdiction.
3. Where an appeal from the ordinary is of such a nature that it can be entertained by the court of law, new evidence may be offered.

475

1b

1b

PACKING COTTON.

See Cotton. Indictment.

PARTITION.

1. In proceedings to obtain partition at law, it must appear on the proceedings, that the ancestor died intestate. — *Barnes vs. Branch*,

19

PARTNERS AND PARTNERSHIP.

1. After the dissolution, one partner cannot bind the other by a new contract, but the promise of one will prevent the operation of the statute of limitations. — *Veal vs. Hassan*,

278

PAROL GIFT.

1. The delivery of property, on the marriage of a child is presumption of a gift, and will be considered as such, unless there be something to counteract the presumption, and this without regard to time. — *Bell vs. Strother*,
2. Where a parent suffers property to go into the possession of a child upon marriage, it is *prima facie* evidence of a gift. — *Degraffenried vs. Mitchell*,

267

506

PAYMENT.

See Evidence 1. Pleading 1.

PENALTY.

See *Damages*.

PERJURY.

1. It is necessary to constitute the crime of perjury that the false oath should have been taken in a judicial proceeding, or in some other public proceeding in like nature, and that the person who received the oath, should have had competent authority to receive it.—*State vs. McCroskey*, 308
2. In this State arbitrators even appointed by the court, have no authority to administer an oath; and a person cannot be indicted for taking a false oath before them.
3. Without an act of the Legislature, it seems, the courts cannot legally authorize any persons to take an oath before them.

PLEADING.

See *Practice*.

1. Payment made after suit brought can not be given in evidence under the general issue; but all matters of defence arising after action brought must be pleaded *pais darrien continuance*.—*Elms & Go vs Beers & Bunnell*, 1
2. If a contract be made by an infant and an adult, they can not both be sued thereon, but the action should be brought against the adult only.—*Connolly ads. Hull*, 6
3. The declaration need not describe the *locus in quo* so particularly and specifically, that the sheriff may certainly know it to deliver possession of it, it is sufficient that the description is good to a common intent, or described as it is generally known or understood.—*Cruickshanks vs. Freeman*, 84
4. Upon demurrer, notwithstanding the defects of the pleading demurred to, the court will give judgment against the party whose pleading was first defective in substance.—*Talvande vs. Cripps*, 147
5. If tenants in common join or are joined in a suit, as avowry for

rent, they must plead jointly; but if each proceeds for his own, each must avow for himself

1b

6. In declaring on contracts not under seal, which do not contain within themselves the acknowledgement of a consideration, or from which a consideration is not implied by law, it is incumbent on plaintiff to set out and prove a consideration.—*Treadway vs. Nicks*, 195
7. So, where an order stated no consideration, the plaintiff cannot recover on a count stating it to have been given for "value therein acknowledged." 1b
7. On the plea of *non est factum* to a bond conditioned to perform covenants, the plaintiff must have a verdict, if the bond be proved; and on a reference to the jury to assess the damages, they cannot find for the defendant.—*Perry, vs. Clymore*, 245
8. The plea of *non est factum*, to a bond, only puts the *factum* of the bond in issue, and the defendant under such a plea, cannot object that the bond was illegally assigned to the plaintiff.—*Soleman vs. Evans*, 274
9. A party who suffers a case, to go to the jury, cannot, after verdict, object that the issue was not joined.—*Taylor and Young vs. Stockdale*, 302
10. Where the plaintiff sued on a bond as Commissioner in Equity, a plea that he is not Commissioner is a plea in bar.—*Trimmer vs. Hamilton*, 425
11. Upon the court's ordering a plea to be stricken out as improper, it may grant time to the party to plead over. 1b
12. Where the subject matter of the plea tends to shew that the plaintiff cannot maintain any action, it should be pleaded in bar, and not in abatement. 1b
13. To an action of assumpsit, defendant pleaded a tender before action, viz: on the 6th March 1823; and the plaintiff replied that his writ was sued out on the first Monday after the fourth

- Monday in October, 1822. The defendant rejoined that the tender was made before suit brought. Held that plaintiff's replication, must be taken as true, and that defendant's plea ought not to have been allowed, without showing that he tendered costs also.—*Hinchy vs. Foster*, 428
14. To debt on a bond against the securities for the prison bonds, defendants pleaded performance generally, and replication that the defendant did not render in a schedule, &c. according to the condition of the bond, a rejoinder that the securities surrendered the principal to the sheriff, who received him, and discharged them, was held ill, and not a good answer to plaintiff's replication.—*Miller vs. Bagwell*, 429
15. Where husband and wife have separated, and the wife has acquired some personal property, in a suit for a trespass to such property, it is error to join the wife with the husband.—*Robards vs. Hutson*, 475
16. Upon a confession of judgment on an *inimus compulssent*, the fact of a bond's forming an item in the account will not vitiate the proceedings.—*Hall vs. Moreman*, 477
17. But if there be an irregularity in the bill of particulars, the defendant may waive it, by a confession of judgment; and the clerk has no right to refuse to record the judgment, on that account. 16
- POSSESSION.
See *Trespass to Try Title. Evidence*.
- POWER.
See *Executor*.
- PRACTICE.
See *Insolvent Debtor, & Prison Bounds*
1. In proceedings to obtain partition at law, it must appear on the proceedings that the ancestor died *intestate*.—*Barnes vs. Branch*, 19
2. A guardian appointed by the court of law to superintend the interest of a minor, in the partition of an *intestate's* estate, must have notice of it, and express his intention to accept; and where such guardian has never had such notice, and the court is satisfied injustice has been done the minor in the partition, on motion it will set aside the proceedings; notice being first given to the opposite party. 14
3. A judgment may be set aside several years after it has been entered up, on the ground that the verdict exceeded the damages in the writ. 16
4. The court of common pleas has always exercised the power of looking into its proceedings, and on motion affording that remedy after judgment has been entered up, which is obtainable by a writ of error in the English courts, but the court will be cautious in exercising such authority. 16
5. Every application to the court for leave to enter up judgment *nunc pro tunc*, after the year and day, is an application to the discretion of the court, and the court will be satisfied,
1st. That there was some good reason for the delay,
2nd. That the rights of others shall not be affected, before they will grant the leave.—*Galpin vs. Fishburn*, 22
6. And where a judgment was confessed on a writ, there being no declaration or particular cause of action stated, and fifteen months elapsed before the death of the defendant, and two years and some months after his death, the court refused to permit the plaintiff, after such negligence, to enter up his judgment *nunc pro tunc*. 16
7. The pendency of a suit in another state is no reason, of itself, for the delay of a cause in this state; but when it is obvious to the court, that their decision will affect rights to be ascertained by the determination of such suit, and where such rights are involved in the cause here, they will grant a reasonable time to obtain such determination.—*Chattel vs. Bolton*, 22

9. If the appeal court is deceived when they award a new trial, it is not for the court below to reverse their order; but for that tribunal, if they think proper.—*Gibson, Falconer & Co. vs Steele*, 45
10. On counts for money had and received, a horse sold and delivered, &c. plaintiff proved that defendant acknowledged he had received and sold a horse of plaintiff's, but the value of the horse not being proved, the court granted a new trial, the jury having found a verdict of \$50.—*Billings vs. Lenox*, 51
10. This court will entertain appeals from all orders made at chambers, which are, in their operation, conclusive as to the rights of the parties; as all motions for the benefit of the prison bounds act, &c.—*Knight vs. Braker*, 80
11. Where a party's domicile is still in the state, though he be absent from the state, yet the service of a writ, by leaving a copy at his usual place of residence, is good.—*Cruikshanks vs. Frean*, 84
12. But the court will suffer the defendant, upon shewing the circumstances, to come in and plead, at any time before judgment; and even after judgment the court will upon merits shewn, open the case and let the defendant into his defence, if he had not an opportunity of coming in before
13. Where the plaintiff obtained judgment on a bond secured by mortgage and upon suggestion, obtained an order for the sale of the premises, under the act of 1791, and the premises were sold, the court, after the sale, granted leave to the plaintiff, to state in his suggestion, that intermediate judgments had been obtained against the defendant, since execution of the mortgage and plaintiff's judgment, which he had omitted in his suggestion.—*Treasurers vs. Bourdenaux*, 132
14. A third person, because he claims the land sold, has no right to come into court to set aside the judgment, on account of defect in form. 1b
15. Irregularities, such as are amendable by the court, consist either in omitting to do something that is necessary for the due and orderly conducting of a suit, or in doing it in an unreasonable time, or improper manner. 1b
16. An execution can be amended after a sale has been made under it of lands, the usual words of authority to the sheriff having been omitted. 1b
17. But the court will be more circumspect in amending after judgment than before, but the power is as ample in the one case as the other. 1b
18. The court will grant a new trial *toties quoties* where the verdict is contrary to law; and when there is no evidence on which the jury can found their verdict, and the case is brought before the court, in such a shape that it can put an end to unprofitable litigation by a nonsuit, it will be granted.—*Turnbull vs. Rivers*, 132
19. Where the jury find for a defendant on all the issues made, a general verdict is good.—*Talvande vs. Cripps*, 147
20. Where judgment is obtained against one of several defendants the plaintiff can not be consulted.—*Williams vs. Rearrs*, 234
21. By the practice of this state, a plaintiff may be nonsuited against his will.—*Note*, 235
22. Where the court obliged a plaintiff on motion of the defendant, while the case was before the jury on the issue of *non est factum* in a suit on a bond for covenants, to submit the question of damages to the jury, without being served with a rule by the defendant, so to do, the court said, they would not set aside a verdict found under such circumstances, unless the plaintiff had objected before the verdict, on account of the surprise, or on account of his want of preparation to prove his case before the jury.—*Perry vs. Clymore*, 246

23. A second writ cannot be considered as an *alias*, if it be issued more than a year and a day, after the first, and all the *intermediate* writs must be regularly lodged with the sheriff, and cannot, at a subsequent period, be made out, so as to fill up the intermediate numbers, to prevent the statute of limitations.—*Bank vs. Baker*,

24. A party who suffers a case to go to the jury, cannot, after verdict, object that the issue was not joined.—*Taylor and Young vs. Stockdale*,

25. Under the act of 1815, allowing executions to be issued at any time within three years after the signing and enrolling of judgment, without any revival of the same, where a judgment was signed 29th April 1822, and *fi. fa.* issued the next day, which was returned, without any proceedings, and no other proceedings had until a *fi. fa.* was issued the 18th April, 1825, and on the 15th June, a *ca. sa.* under which the defendant was imprisoned, the court discharged the defendant, and set aside the *ca. sa.* on the ground, that it issued more than three years after judgment, and was not a renewal of the *fi. fa.*—*Primrose vs. Beckett*,

26. A question of fraud in obtaining a judgment, or a question as to the regularity of the declaration, in conforming to the bill of particulars, after a confession of judgment, cannot be tried by rule or motion.—*Hall vs. Moreman*,

27. Upon a confession of judgment on an *insinuat computassent*, the fact of a bonds forming an item in the account will not vitiate the proceedings.

28. But if there be an irregularity in the bill of particulars, the defendant may waive it, by a confession of judgment; and the clerk has no right to refuse to record the judgment, on that account.

PREAMBLE.

1. The preamble to an act may be

used to explain an equivocal expression used in the enacting clause, but never to control its obvious meaning, nor to supply matter not embraced in its spirit and meaning — *Bynum vs. Clark*, 226

PRESUMPTION.

See Way. Prescription.

PRESUMPTION OF PAYMENT.

See Bond. Evidence.

PRESCRIPTION.

1. In order to presume a grant of a way, uninterrupted use for at least twenty years is necessary, and the identity of the road must be established, and an acquiescence shown on the part of the owner of the land.—*Turnbull vs. Rivers*. 131
2. Where the plaintiff was permitted to pass over the unenclosed lands of the defendant, as all the rest of the neighbors, and the way changed with every change of the fields and fences, at the will of the owner, he cannot claim such way by prescription. *Id.*
3. Where a way had been uninterruptedly used from 1769 to 1800, but after that period had not been used much, and had been obstructed three or four times in different years, and some wide deviations made from its original course, the court held the right not destroyed, having been perfected by twenty years uninterrupted enjoyment.—*Cuthbert vs. Lawton*, 194
4. But if it had only begun to accrue since 1800, it seems the obstruction of one year only in twenty, would prevent its legal consummation; but after twenty years uninterrupted use, it could only be defeated by an adverse and continued obstruction for five years. *Id.*

PRIORITY

1. A debt due to the Bank of the State of South Carolina, is not a debt due to the public, and can claim no priority on that ground.—*Bank vs. Gibbs*, 377

PRISON BOUNDS.

See Insolvent Debtor.

PROMISSORY NOTES.

See Bills of Exchange.

PROHIBITION.

1. Granting or denying a writ of prohibition, is in a great measure discretionary with the court. But it is the duty of the superior courts of law to confine all subordinate jurisdictions to their proper bounds; and the question of jurisdiction is to be determined by the superior and not the inferior court.—*Gray vs Court of Magistrates,*
2. Generally a prohibition may be awarded, as well after, as before judgment; but the converse is true in cases where the court had jurisdiction of the matter, but was restrained by some statute, and the party by pleading admits the jurisdiction.
3. A party has a right to appeal, on an application for a prohibition, from an order made at chambers, or on circuit, and it seems the subordinate court has no right to proceed after notice of such appeal.
4. It has been sometimes the practice to grant a prohibition, until the determination of the appeal.

176

Ib.

Ib.

Ib.

RATAHABITIO.

1. See the doctrine of *ratahabitis*, or confirmation, in note, p.

496

RECEIVER OF STOLEN GOODS.

See Larceny

RECORD.

1. A deed of land is not affected in any way, by not being recorded, except as to subsequent purchasers from the same vendor, or as to subsequent creditors.—*Martin vs. Quattlebam,*

205

RELEASE.

1. A parol release cannot prevail against a deed. So where A. gave the sheriff his bond to produce a slave named B. at a certain day,

he cannot prove by parol that the sheriff agreed to receive a negro named C. instead of B.—*Perry vs. Clymore,*

245

2. A release of the equity of redemption completes the legal title in the mortgagee.—*Taylor & Young vs Stockdale,*

302

RENT.

See Distress.

1. In an avowry for double rent, under the act of 1808, the avowry need not state that three months notice in writing to quit was served on the tenant, where the tenant himself gave such notice of his intention to quit.—*Talvande, vs. Cripps,*

147

2. Under the act of 1808, the demand in writing to be made, for surrender of possession by the tenant three months afterwards, need not be made by all the tenants in common, but it is sufficient if made by one tenant in common, requiring delivery of possession to him, for himself and co-tenants.

Ib.

3. After verdict, upon an avowry for double rent, a demand before the distress will be presumed. But when the tenant himself gives notice of his intention to quit, a demand may be made after distress; and *quare*, if any demand is necessary.

Ib.

4. The law allowing a landlord to distrain for double rent, where the tenant holds over after notice to quit, is not unconstitutional; for by the continuance of the tenant he makes it his contract.

Ib.

RENEWAL.

See Execution. Practice.

REPLEVIN.

See Tenants in Common.

1. An action cannot be sustained on a replevin bond, against the securities, unless a judgment (of *non pros.* or otherwise) has been obtained in the replevin suit, and a *retorno habendo* ordered.—*Pembble vs. Clifford,*
2. The statute of George 2, which requires two securities to a replev-

43

in bond is not of force in this state. — *De Bo. vs. Mc Cleary*, 43

3. If the law did require two securities, it would be too late after judgment to take advantage of such omission.

ROADS.

See *Way*.

SECURITY.

See *Insolvent Debtors*.

1. The securities to a prison bounds bond cannot discharge themselves by a surrender of their principal to the sheriff. — *Miller vs. Bagwell*, 429
2. Where a bond is given for the prison bounds, and the debtor remains within the rules forty days, without rendering his schedule, and is then committed to the jail, the securities are not thereby discharged from liability on the bond; but the plaintiff has the double security of the bond, and the confinement of the defendant.

SETT OFF.

See *Discount*.

SERVICE.

1. Where a party's domicile is still in the state, though he be absent from the state, yet the service of a writ, by leaving a copy at his usual place of residence, is good. — *Cruickshanks vs. Frean*, 84
2. But the court will suffer the defendant, upon shewing the circumstances, to come in and plead, at any time before judgment; and even after judgment the court will, upon merits shewn, open the case and let the defendant into his defence, if he had not an opportunity of coming in before.

SLAVES, LAW RELATING TO

See *Indictment*.

1. The act of 1740, authorizing magistrates to seize and sell horses belonging to slaves, is constitutional; for slaves can hold no property, nor sue or be sued; and the exercise of such authority by

a magistrate in determining whether the horse belonged to the slave or not, is a judicial act. — *Peake vs. Canty and Johnson*, 107

2. The act of 1740, authorizing any person to seize and carry to the nearest magistrate, any horses, kept, raised or bred by slaves, who is authorized to sell them. But the horses must have been appropriated for the peculiar use and benefit of slaves. — *Clarke vs. Blake*, 179

3. Though the horses be condemned and sold by the magistrate as the property of a slave; yet the true owner, if he be a freeman, may have his action for damages against those who seized his horses. The decision of the magistrate is no bar to the action, and the fact that the plaintiffs agent had notice of the seizure cannot alter the case; as no person can take the necessary oath before the magistrate, but the owner of the horses.

4. Under the act of assembly 1819, requiring the owner, or some white person, to reside on all plantations, whereon there are more than ten working slaves, he may live on any part of his land, forming the same plantation, that circumstances may render convenient, however distant from his slaves. — *State vs. Blythe*, 363

5. A master of a slave is not liable for damages resulting from the negligence or trespass of his slave. — *Wingis vs. Smith*, 400

6. But slaves who are tradesmen, ferrymen, carriers, and others acting in such like capacities, form exceptions to this rule. In such cases, the master by inviting others to repose confidence in them, becomes security for the faithful performance of their duty, and must be answerable for their neglect.

7. See an account of slaves in England, in note _____ p. 408

8. On an indictment for killing a slave "in sudden heat and passion" contrary to the act of assembly, the jury found a verdict of "guilty of manslaughter."

Upon which the court held judgment could not be passed.—*State vs. Rains*, 583

9. The crime, by act of assembly, of killing a slave in sudden heat and passion, is a different offence from the common law crime of manslaughter. *Ib.*

10. It is not enough to say, in an indictment, that a crime has been committed, in the words of the act; but it is also necessary to specify on the face of the indictment the criminal nature and degree of the offence, and also the particular facts and circumstances which render the defendant guilty of the offence. *Ib.*

11. The act of 1821, rendering it murder to kill a slave, does not take away from the prisoner, if he be master or overseer, in whose possession the slave was killed, the right of exculpating himself by his own oath. And the fact of a third person coming up at the moment of the death of the slave, after the wounds were given, will not alter the case. *Ib.*

SHERIFF AND SHERIFF SALES.

1. A sheriff may assign a bond given to him as sheriff for property bought under an attachment sale; and the assignee may bring the action in his own name, as assignee.—*Ilite vs. Schults*, 218

2. Wherever a bond is drawn to one and his assigns, by the law of the contract it is assignable. *Ib.*

3. Though the indorsement was in blank and filled up after suit was brought, it is good. *Ib.*

4. When a sheriff levies on personal property it becomes his own for all legal purposes. He can maintain an action for it, even against the debtor himself, at any time before the sale or satisfaction of the execution.—*McClintock vs. Graham*, 243

5. When the execution is satisfied, if otherwise than by sale of the property, the right of the debtor recurs, and the right of the sheriff ceases to exist against him. *Ib.*

6. The sheriff's right, still, how-

ever, until return of the property to defendant, remains against every other person than the owner; for the owner looks to the sheriff for a return of the property when the execution is satisfied; and the sheriff may maintain trover against any, but the lawful owner, for a conversion. *Ib.*

7. When the sheriff assigns a bail bond to the plaintiff, under the statute 4 Anne, c. 16, it must be done under his hand and seal, with two subscribing witnesses.—*Solomon vs. Evans*, 274

8. Where a sheriff advertises property in a district where a gazette is printed, he is entitled to receive the costs of printing such advertisement, and nothing more.—*State vs. Beckett*, 290

9. When property is for sale by sheriffs in districts where Gazettes are printed, the advertisement must be published in one or more of them; and where there are no gazettes printed, notices must be put up at the court house door, and at two other public places in the district. *Ib.*

10. And it is not necessary, in districts where gazettes are published, to give any other notice, than in a gazette. *Ib.*

11. But where a gazette is not published within the district but there is one within forty miles of the court house, advertisements must be published in such gazette, as well as at the places in the district. *Ib.*

12. In all cases where the law requires the publication in the gazette, the sheriff is entitled to such costs; and where it requires, also, three other advertisements in the district, the sheriff is entitled to the fees for such manuscript advertisements. *Ib.*

13. For advertisements not published in a gazette, the sheriff is entitled to \$1, for the first time, and 50 cents for each succeeding advertisement in the same case. *Ib.*

14. Where there are a number of plaintiffs against the same de-

defendant, and his property is advertised under all their executions, the sheriff is still only entitled to the costs of one advertisement; as all the plaintiffs names can be put into the same advertisement.

15. Notice by the landlord to the sheriff, before the whole of the goods are removed off the premises, is in time, under the statute of 8 Anne, c. 17, to entitle the landlord to demand of the sheriff one years rent; or should the goods sell for less than one years rent, then for as much as they produce, after paying the sheriff such costs as were incurred before notice given him of the rent due, and after all just allowances.—*Margart vs. Swift*, 378

16. Where a purchaser, under sheriff sale, refuses to comply with his bid and the sheriff goes out of office, his successor cannot bring an action for a breach of the contract.—*Underwood vs. Jacobs*, 47

17. No privity exists between a sheriff and his successor, but what is created by statute; and it has never yet been extended to actions accruing to the predecessor by contract, tort, or any other cause.

18. *Quere?* Whether a purchaser at sheriff sale, who does not comply with his contract, should be sued by the sheriff, or by the person whose property is sold?

19. The defendant gave the plaintiff, who was sheriff, a receipt for a negro slave levied on, to deliver the said slave to the sheriff on a particular day, or to pay \$500. The court held, that the defendant might, to an action brought on such receipt for not delivering the slave, shew that the executions under which the slave was levied on were satisfied, and that the slave had been bought from the defendant in such executions, and that he had delivered the slave to such purchaser; or that he might shew that the slave was transferred to him, or

give any other evidence to identify himself with the purchaser.

—*Bates vs. Gest*,

493

20. The sheriff by taking property in execution acquires a mere qualified property to enable him to execute the trust reposed in him; and whenever the object of the levy is answered or the execution is otherwise paid, the right of property in him ceases, and reverts to the original owner or to those claiming under him.

Id.

STATUTE.

1. The preamble to an act may be used to explain an equivocal expression used in the enacting clause, but never to control its obvious meaning, nor to supply matter not embraced in its spirit and meaning.—*Bryum vs. Clark*, 298

SUMMARY PROCESS.

1. A plaintiff has no right, by giving a credit, without the consent of the defendant, to reduce his demand within the summary process jurisdiction.—*Bent vs. Graces*, 290
2. The parties by mutual consent, cannot give jurisdiction, much less can one, without the consent of the other, *Id.*
3. So, the plaintiff cannot by releasing part of his demand reduce his cause of action, within an inferior jurisdiction. *Id.*

SURPLUSAGE,

See Verdict.

SURVEYING.

See Trespass to Try Title.

1. Where a grant calls for another tract of land as a boundary, it must follow the lines of the tract so called for, no matter how zigzag; and the fact of the plat representing such line as a straight line, the same not having been closed, can make no difference. The same rule applies to natural boundaries.—*Atkinson vs. Anderson*, 223
2. It is the actual boundary and not the false representation of it

- on the plat which must govern *1b*
3. There is no more propriety in stopping at the first point which is presented, and from thence running a straight line, than there would be in going to the most distant one, which is to be found in any of the angles of the boundary, and running a straight line from that. *1b*
- Boundaries may be proved by hearsay. 227-230

TAXES.

1. A bond held by an inhabitant of the city of Charleston is subject to taxation, though the obligor reside out of Charleston.—*Hayne vs. Delicassline*, 374

TENANTS IN COMMON AND JOINT

TENANTS.

1. If tenants in common join or are joined in a suit, as avowry for rent, they must plead jointly; but if each proceed for his own, each must avow for himself.—*Talvande, vs. Cripps*, 147
2. Under the act of 1808, the demand in writing to be made for surrender of possession by the tenant three months afterwards, need not be made by *all* the tenants in common, but it is sufficient if made by one tenant in common, requiring delivery of possession to him, for himself and co-tenants. *1b*
3. One tenant in common can not maintain an action to try titles against his co-tenant.—*Martin vs. Quattlebam*, 206
4. An action of trespass to try titles cannot be brought by a co-tenant against a person who has entered and holds under the authority of the other co-tenant. *Taylor and Young, vs. Stockdale*, 302

TENDER

1. To an action of assumpsit, defendant pleaded a tender before action, viz: on the 6th March 1823; and the plaintiff replied that his writ was sued out on the first Monday in October, 1822. The defendant rejoined that the tender was made before suit

brought. Held that plaintiff's replication must be taken as true, and that defendant's plea ought not to have been allowed, without shewing that he tendered costs also.—*Hinchy vs Foster*, 428

TITLE

See *Trespass to try Title*.

TRESPASS TO TRY TITLE, AND QUARE CLAUSUM FREGIT.

See *Surveying*.

1. In an action of trespass *quare clausum fregit*, the plaintiff must recover either upon his possession or his title.—*Rhodes, vs. Bunch*, 66
2. Facts and circumstances may be given in evidence, by way of mitigation, which were the inducements to a transaction; even though they may happen to involve character. *1b*
3. So in trespass *clausum fregit*, in mitigation, defendant may prove the land to be his, and that the plaintiff had obtruded himself into the possession of his land; that he was a vagabond, and that he had obtruded himself into the place for the purpose of preying upon the neighborhood, and trading with their slaves. *1b*
4. When the declaration in trespass *clausum fregit* and to try titles, describes the premises too generally, the verdict cannot cure it, by a finding with a proper description of the *locus in quo*. And where the jury do give such a verdict, such further description than that contained in the declaration will be surplusage.—*Cruikshanks, vs. Frean*, 84
5. Where the declaration stated that the defendant "did break and enter the lot and close of the plaintiff, in State street, in Charleston, aforesaid," and the verdict was, "We find for the plaintiff the within lot of land, situate in State street, in front on said street 26 feet, in depth from E. to W 86 feet, bounding to the N. on lands of A F—E. on State street aforesaid—W. on lands of E., and S on lands of M. with

- \$400 damages," the court held that the verdict contained surplusage, as to the metes and bounds, but supported it as a general verdict for the plaintiff.
6. The declaration need not describe the *locus in quo* so particularly and specifically, that the sheriff may certainly know it to deliver possession of it, it is sufficient that the description is good to a common intent, or described as it is generally known or understood.
7. If the *locus in quo* be not sufficiently described, the plaintiff may point it out to the sheriff and take the possession at his peril.
8. The act which authorizes a survey in trespass to try title is not imperative, and never was designed to be used when unnecessary. Either party may resort to it, to prove the identity of their lands, where they have not other sufficient evidence thereof.
9. Where judgment goes by default, evidence of the *locus in quo* is unnecessary.
10. One tenant in common cannot maintain an action to try titles against his co-tenant.—*Martin vs. Quattlebam*, 205
11. The declarations of a person who has taken possession of land and held it for five years, may be given in evidence to shew in what right he held, whether in his own right or as tenant.—*Hall, vs. James*, 222
12. But a man's loose declarations will not be suffered to prevail against the truth of the case as ascertained on the trial.
13. Where a man's rights depend on his acts, his declarations may be given in evidence to shew the nature of those acts.
14. The declarations of a surveyor dead at the time of the trial, who originally located the land, are admissible, on a question as to the location.—*Blythe vs. Sutherland*, 258
15. So, where the death of the surveyor whose declarations were offered, was a matter of public notoriety, and the party inadvertently neglected to prove his death, and by direction of the court a verdict was found against him for that reason, the court granted a new trial, that he might prove that fact; as it was an inadvertence, from which the most circumspect are not exempt.
16. The declarations of a party, when accompanied by an act, may be received in evidence as explanatory of that act, as constituting a part of the *res geste*.—*Turpin vs. Brunn*, 261-262
17. So, where the plaintiff gave in evidence the acknowledgements of B an incompetent witness, that he held as tenant for the plaintiff, the defendant may prove B's declarations as to his motives and the manner of his tenancy, as explanatory of the act.
18. Where a tract of land was sold at sheriff sale as the property of C. in an action to try titles between A. against B. the purchaser, a plat of resurvey made for C. may be given in evidence to shew the extent of the defendant's possession.
19. There are some exceptions to the rule, that a judgment cannot be given in evidence to affect any but parties or privies; as where it constitutes a link in a chain of titles, or goes to establish a collateral fact; as to shew that the declarations of a tenant could have no effect upon the rights of the parties from the situation in which he stood.
20. No colour of title is necessary to give a party a right by possession.
21. After the quiet enjoyment of lands for five years, (now ten) the law presumes a title in the occupant which may have been lost by accident. The possession is substituted in the place of title.
22. The possession being proved by other evidence the deed is only looked to as defining its extent; and for that purpose a mere survey is as high evidence.
23. If a person be in possession of

- a particular lot or tract of land, well known by a particular name, the bounds of which are distinctly marked, it would be sufficient to authorize the jury from possession of a part to find a verdict for the whole, even though the possessor should have neither deed nor plat
24. Whenever, therefore, a person holds by possession only, a deed, plat or any other color or semblance of title, will, usually, furnish of itself sufficient evidence of the extent of his possession, without any other proof.
25. When he has not such evidence he may resort to any other; such as visible marked lines, adjacent ditches, fences, or any other that shall be satisfactory to the minds of the jury.
26. State demands or claims of land are not to be encouraged.
27. The granting of a new trial is matter of discretion, and will not be exercised where the court sees that justice has been done — *M-Kie vs. Garlington*, 276
28. So, in an action to try titles, where the original defendant was tenant to the plaintiff and had no right to dispute his title, and a motion was made by a third person to come in under the rule of court, as the real deft. and the court refused the evidence of tenancy, but suffered the third person to come in and defend, and upon the trial it appeared that the plaintiff had no title, the court said, although the evidence of the tenancy should have been admitted, and if proved the court thought the second defendant should not have been allowed to come in, yet justice having been done, a new trial would not be granted.
29. A copy of the memorial of a grant from the State of North Carolina, with a copy of the plat, taken from the Secretary of State's Office, in North Carolina, regularly certified by the Secretary of State, and Governor of that state, by the act of 1803 is admissible evidence in this state of a grant and survey, if the party so offering it swear that it is out of his power to produce the original. — *Bird vs. Smith*, 300
30. An action of trespass to try titles cannot be brought by a co-tenant against a person who has entered and holds under the authority of the other co-tenant. — *Taylor & Young vs. Stockdale*, 302
31. To maintain trespass *quare clausum fregit*, the plaintiff must have either an actual or constructive possession. — *Davis vs. Clancy & Johnson*, 422
32. A constructive possession is sufficient, where the defendant is not in the actual possession. *Ib*
33. Where the land is leased, the landlord cannot bring the action; the tenant must.
- Ib* But where a person is only put into the possession of land to prevent the trespass of others, his possession is the possession of the landlord, who may maintain his action of *quare clausum fregit*, notwithstanding such an agent may be allowed to cultivate a part of the land for himself. The part of the land so cultivated by the agent or tenant may be considered as in his exclusive possession, and the rest in the possession of the landlord. *Ib*
- TRUSTEE.
1. A trustee cannot acquire a title by the statute of limitations against his *cestuique trust*. — *Howard vs. Aiken*, 467
- USAGE.
- See Freight.*
1. A usage to become law, must be of long standing, general in its operation, and known to, and acquiesced in, by all those whose rights are affected by it, besides being just and reasonable in its operation. — *Hayward vs. Middleton*, 121
2. The consignor is liable to the carrier for freight; and the carrier is not bound to look to the consignor's factor for it; and no legal usage or custom to the con-

trary exists in Charleston.

3. If the consignee be liable, it does not free the consignor from his liability, as two may be liable for one debt.

USURY.

1. In an action by the indorsee against the drawer, the indorser is a competent witness to prove usury.—*Knight, vs. Packard*,
2. Where usury is set up as a defence to an action, and the plaintiff is called upon by the defendant to swear whether the consideration of the contract was usurious or not, and does swear that it was not usurious, the defendant can not introduce other witnesses to *contradict* the plaintiff. *Fulmer, vs. Hays*.
3. But the plaintiff may be called upon to prove one fact, and other witnesses to prove other facts connected with it, all of which, taken together, may establish the usury, which could not be made to appear by any one witness.
4. Usury may, sometimes, be inferred from a train of circumstances.
5. It is not usurious to sell or buy a negotiable paper, founded on a legal consideration, for less than its nominal value.—*King and Jones, ads. Johnson*,
6. So where a note was given for money advanced, to be returned to the drawer when he should pay a debt to which the drawee was security for him, and the drawee indorsed the note and traded it off before it became due at more than the rate of legal interest, it was held not to be void in the hands of an innocent holder.
7. It seems the transaction would not have been usurious in the hands of any body, as the original consideration was legal.
8. Where a note, on a legal consideration, is drawn to order, and indorsed, no matter how often it has been polluted in the hands of intermediate holders, it is still valid in the hands of a bona fide holder.

VENDOR AND VENDEE.

1. Upon an action brought upon a note given for the purchase money of a tract of land, the defendant cannot set up by way of defence, an outstanding title for a part of it, which outstanding title had been bought up by the plaintiff (vendor) since he sold to the defendant; For if a man sell land to which he has no title, and afterwards acquire a title, he is estopped by his first deed to say he had no title, at the time he sold.—*Craig vs. Recorder*,
2. Under a general warranty of title in this state, the purchaser may maintain an action against the grantor, before eviction, if he can shew that he had no title at the time of sale.—*Johnson vs. Veal*,
3. But such a general warranty of title has the effect of a *special warranty of seisen*; as no action can be maintained upon a covenant for *quiet enjoyment* until eviction.
4. In case the warranty constitutes a covenant of *seisen*, it is broke as soon as made, if the grantor have no title; and the statute of limitations will commence from the date.
5. If the warranty constitutes a covenant for *quiet enjoyment* only, then the statute will not commence to run until eviction.

VENDUE MASTERS.

See Insolvent Debtor.

VERDICT.

1. When the declaration in trespass *clausum fregit* and to try titles, describes the premises too generally, the verdict can not cure it, by a finding with a proper description of the *locus in quo*. And where the jury do give such a verdict, such further description, than that contained in the declaration, will be surplusage.—*Cruikshanks vs. Freeman*,
2. Where the declaration stated that the defendant, "did break

- and enter the lot and close of the plaintiff, in State street, in Charleston aforesaid," and the verdict was: "We find for the plaintiff the within lot of land, situate in State street, in front on said street 26 feet, in depth from E. to W. 86 feet, bounding to the N on lands of A. F.—E. on State street aforesaid—W. on lands of E., and S. on lands of M. with \$400 damages," the court held, that the verdict contained surplusage, as to the metes and bounds, but supported it as a general verdict for the plaintiff. 1b
3. When the jury find for a defendant on all the issues made, a general verdict is good.—*Talvande vs. Cripps*, 147
4. It seems, the verdict of a jury for the value of a negro, and a further sum for his services, instead of a gross sum, though not formal, is, notwithstanding, sufficiently certain.—*Ryan vs. Bald- rick*, 498
5. So, a verdict for so much for not delivering a specific article contracted for, and so much for interest, by way of damages, is sufficiently certain. 1b

WARRANTY.

1. Where the defendant sold and warranted a horse to the plaintiff and a prior lien deprived the plaintiff of the benefit of his purchase, and the parties agreed to estimate the damages at \$30 less than the plaintiff had paid for the horse, the plaintiff may recover the \$70, either on a count for money had received, or by a special count on the breach of warranty.—*Rivers vs. Cain*, 239
2. A warranty of the soundness of a slave, includes soundness of the mind, as well as of the body.—*Piper vs. Stinson*, 251
3. Under a general warranty of title, in this state, the purchaser may maintain an action against the grantor before eviction, if he can shew that he had no title at the time of sale.—*Johnson vs. Feal*, 449

1. But such a general warranty of title has the effect of a special warranty of seisen; as no action can be maintained upon a covenant for quiet enjoyment until eviction. 1b
5. In case the warranty constitutes a covenant of seisen, it is broke as soon as made, if the grantor has no title; and the statute of limitations will commence from the date. 1b
6. If the warranty constitutes a covenant for quiet enjoyment only, then the statute will not commence to run until eviction. 1b
7. The doctrine of implied warranty arises as well on a contract for hire as upon the sale of a slave.—*Colcock vs. Goode & Rose*, 513
8. If a person sell a flock of sheep or drove of horses, the law will not imply a warranty that every member of the flock or drove was sound, but that taken in the aggregate they were so. 1b
9. The same rule will apply to the sale or hire of a gang of slaves. The extent of a warranty implied in such case is, that as a body they are ordinarily good, and have not been picked and culled for the purpose of deception. 1b
10. So, where at a letting to hire by auction, by an executor, the defendant bid off six slaves at \$480 per annum, without any stipulated price as to any of the number, and no particular representation of the qualities of any one of them, he will not be allowed to sett-off the value of the services lost by one of the slaves, who was in bad health and incapable of doing as much as if he had been well 1b
11. A warranty has never been implied, in any case, of any thing more than soundness and title; to make a vendor further liable there must be either fraud or an express warranty. 1b
12. So, where upon the hire of several slaves, without any particular representation of the qualities of any one of them, for an aggre-

gate price, the law will not imply a warranty that one of them was a carpenter.

WAY.

1. In order to presume a grant of way, uninterrupted use for at least twenty years is necessary, and the identity of the road must be established, and an acquiescence shown on the part of the owner of the land.—*Turnbull vs. Rivers*. 121
2. The necessity from which a person denies a right of way, is when one person sells to another lands inclosed on all sides by his other lands, where the law imposes an obligation on the seller to allow the purchaser a way over his adjacent lands.
3. The inconvenience of going always to one's plantation by water, will not amount to such a necessity as will give a way; for necessity and not inconvenience will give a way.
4. Where the plaintiff was permitted to pass over the unenclosed lands of the defendant, as all the rest of his neighbours, and the way continued with every change of fields and fences, at the will of the owner, he cannot claim such way by prescription.
5. It seems if a person owns land between two roads, one on the east and one on the west, and shall sell that lying on the west, it gives to the purchaser no right of way across the seller's land, to the road bounding him on the east, whatever may be the distance or difficulty of getting to that road.
6. So, it seems if a person should sell to another the extreme point of a neck or tongue of land surrounded by an open sea, or navigably stream, except on one side, the fact of its being sometimes more convenient to the purchaser to pass through the vendor's land than to go by water, will not give him a right of way; and the case is much stronger when it is not between vendor and vendee.
7. The act of 1817, taking away

from the commissioners of the roads the power to grant or open any new road over the lands of persons who shall signify to the board any opposition, &c. was held by the court to extend to "private paths," mentioned in the act of 1788, and to all description of ways.—*Capers vs. Wilson*, 170

8. Where a party is entitled to a right of way over the lands of others, the owner of the land, and not the claimant of the road, is authorized to lay off the road, in such a manner as is least inconvenient to himself; and if he refuse to lay off the road or obstruct it, an action should be brought against him. 15

9. It was also held that the commissioners had not the power to shut up a new way which they had opened, and to open again an old road which they had closed. The commissioners are not the judges to determine the necessity which gives a way. 16

10. It seems, that if the plaintiff is entitled to a right of way over the defendant's land, the erection of gates upon the way is not such an obstruction as will give a right of action. 16

11. Where a way had been uninterruptedly used from 1769 to 1800, but after that period had not been used much, and had been obstructed three or four times in different years, and some wide deviations made from its original course, the court held the right not destroyed, having been perfected by twenty years uninterrupted enjoyment.—*Cuthbert, vs. Laulton*, 49

12. But if it had only began to accrue since 1800, it seems the obstruction of one year only in 20, would prevent its legal continuation; but after 20 years uninterrupted use, it could only be defeated by an adverse and continued obstruction for five years. 16

WILL.

1. Devise to sell, see *Executor*, 25
2. A very unimportant matter may suffice to make out a

- case of obliteration in a will, if it appear to have been *animo revocandi*.—*Means, vs. Moore*, 282
3. Where the *animo revocandi* is doubtful, the party that alleges it must prove it. It is not enough that a testator *intended* to revoke his will. He must execute some one of the acts prescribed by the statute, to effectuate his intention of revocation. *Ib*
4. Testator intending to alter his will, and make a new one, gave directions for that purpose to witness, as he read over the will to him. The witness made memoranda, by interlining the proposed alterations in pencil, *for his own convenience*. One word was scored through with the pencil. Testator not having completed his directions the first day, was unable from weakness to complete them on the second, and the new will was never drawn. *Held* no revocation, the obliteration not being made by the direction of the testator, nor intended to revoke the whole will. *Ib*
- 1 A verdict without evidence is contrary to law, and the court will always exercise the controlling power of granting new trials; and a similar finding of a second jury cannot alter the law; and the court will continue to grant new trials.
5. A will of personal property takes effect from the time of the death of the testator, and must be executed according to the laws existing at the time of the death. *Houston, vs. Houston*, 491

6. *Quere*, if in the construction of Wills of real estate, relation must be had to the time of execution, or whether it must be governed by the laws existing at the time of the death of the testator? *Ib*
7. By the act of 1824, Wills of personal property as well as real property are required to have three or more witnesses. *Ib*

WITNESS.

See Evidence.

1. The subscribing witness to a contract, whether under seal or not, must in all cases at common law, be produced if alive, and *within the jurisdiction of the court*.—*Townsend vs. Corington*, 219
2. The act of 1802, is confined to bonds and notes, and, as to them, dispenses with the attendance of the subscribing witness, unless the defendant swear the bond or note was not signed by him, or, in the case of an executor or administrator, that he believes it is not the signature of their testator or intestate. *Ib*. 220
- See note of cases.*

WOMEN.

1. The act of 1824, which exempts females from arrests under a *ca. sa.* does not exempt them from arrests under a bail writ.—*Desprang, vs. Davis*, 16

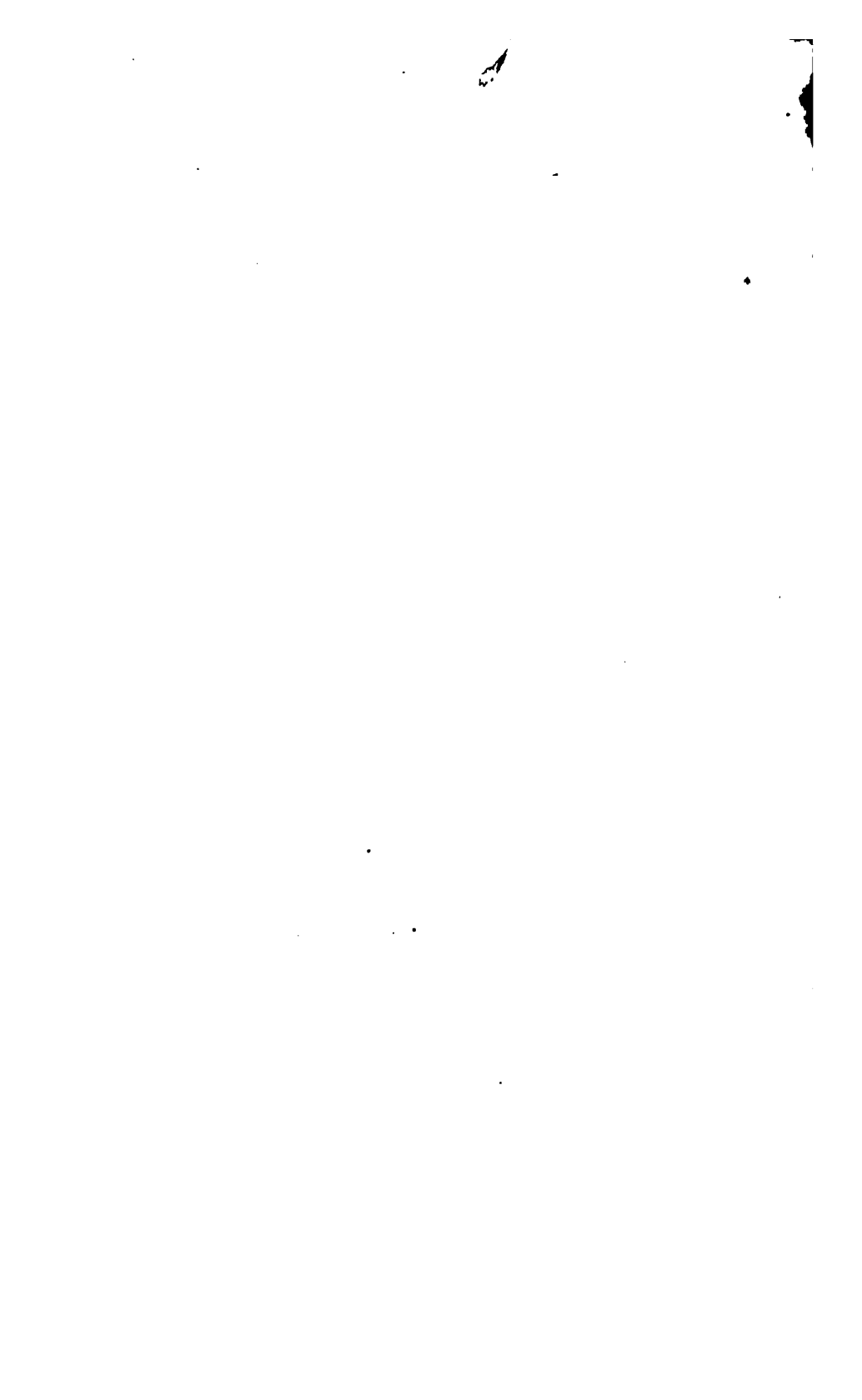
WRIT.

See Service. Practice.

Ex. J. G.

ERRATA.

- PAGE 21. strike out "his" before *consent*,
 63. insert *as* in the last line after *that*,
 64. insert *such*, after *no*, in the 29th line,
 73. in line 32, read *ever* for *even*,
 79. in 23d. line read *pillory* for *pilleroiy*,
 161. in line 12, read 2 N & M.C. instead of 2 M.C.
 206. in line 12, read *deed*, instead of *report*,
 225. in line 5, insert *though* before "*the security*,"
 Do. in line 7, *ad-ministraton*, instead of *adminis-trator*,
 Do. in line 8, *when* instead of *where*,
 237. in line 25, read *judge*, instead of *judges*,
 247. in line 30, read *these*, for *there*,
 253. in line 25, read *warranty*, instead of *meaning*,
 267. in line 10, strike out *under*, before *Spears*,
 do. in last line for *exclusive*, read *even*,
 274. in first line, after *little*, insert "*and in the other it would have been too much*,"
 310. in line 19th read *intrusted* for *instructed*,
 313. in line 2nd, read *procure* for *produce*,
 352. in last line, after last word insert, —*that case no one can*,
 354. in line 16, read *ever* instead of *even*,
 363. in 6th line from bottom, strike out *it* after *court*, and insert *and*
 391. in lines 6, and 8, read *decision*, instead of *discussion*,
 392. in last line strike out '*being there*,'
 293. in first line insert *is* after *adventure*,
 405. in 8th line from bottom, read *fisci*, instead of *isci*,
 433. in 5th line read *stated*, instead of '*held*,'
 434. in last line strike out *doing* and insert *denying*,
 435. in 12th line read *rendee*, instead of *rendor*,
 471. in 26th line read *Thus*, instead of *There*,
 479. in line 23, strike out *exterior* and insert *extensive*,
 480. in 4th line for *given* insert *grave*,
 483. in 8th line from bottom, strike out "*my*,"
 502. in 8th line from bottom, for *distinction* read *discretion*,
 504. in 6th line from bottom, read *our* instead of *one*,
 530. The opinion of the court was delivered by Judge *Colcock*, and
 not by Judge *Nott*.





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